82-2045

No. ____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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## QUESTIONS PRESENTED

In 1979, Congress enacted sweeping reforms in the administration of the antidumping and countervailing duty laws. These reforms established for the first time a right of interested domestic parties to participate in the administrative assessment of antidumping and countervailing duties and a right to appeal assessment determinations to the new United States Court of International Trade. In 1980, in lieu of making a formal determination of antidumping duties as required by the 1979 law, the Secretary of Commerce invoked, for the first time in the administration of the antidumping law, a 60 year old general compromise provision contained in section 617 of the Tariff Act of 1930, as amended. No notice or opportunity to be heard was afforded prior to the Secretary's action. The questions presented are:

1. Whether members of an injured domestic industry and its workers have such a stake in the determination of antidumping duties by reason of their statutory right to a hearing during the assessment process and their statutory right to appeal from any assessment determination that such duties may not be compromised without at least notice and the opportunity to be heard?

2. Assuming that the Secretary of Commerce has authority to compromise antidumping duties pursuant to section 617 without reference to his responsibilities under the 1979 amendments to the antidumping law, whether the court below erred in holding that it had no subject matter jurisdiction to review allegations that the Secretary's compliance with the procedures of section 617 was a sham, and that the report and recommendation required before a settlement may be approved were prepared in bad faith?

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Petitioners—the Committee to Preserve American Color Television (a.k.a. COMPACT) and the Imports Committee, Tube Division, Electronic Industries Association[1]—respectfully pray that a writ of certiorari

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[1] COMPACT is an unincorporated association comprised of manufacturers in the television industry and eleven labor organizations which represent the overwhelming majority of workers in the domestic television industry. The members of COMPACT include: Allied Industrial Workers of America, International Union; American Flint Glass Workers Union of North America; Communications Workers of America; Corning Glass Works; Glass Pottery, Plastics and Allied Workers, International Union; Independent Radionic Workers of America; Industrial Union Department, AFL-CIO; International Association of Machinists; International Brotherhood of Electrical

issue to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit entered in this proceeding on May 2, 1983.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a-8a) is not as yet reported. That opinion affirmed the judgment entered by the United States Court of International Trade on November 15, 1982 which consolidated petitioners' hearing on preliminary injunction with the merits (App. 20a). The opinion of the United States Court of International Trade dated November 15, 1982 denying petitioners' motion for a preliminary injunction (App. 10a-19a) is reported at 551 F.Supp. 1142 (Ct. Int'l Trade 1982).

## JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit was entered on May 2, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

## STATUTES INVOLVED

The relevant provisions of the Antidumping Act of 1921, as amended, the Tariff Act of 1930, as amended, the Trade Agreements Act of 1979, and 28 U.S.C. are set forth in Appendix C (App. 33a-62a).

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Workers; International Union of Electrical, Radio & Machine Workers; Owens-Illinois, Inc.; United Furniture Workers of America; United Steelworkers of America; and Wells-Gardner Electronics Corporation. The Imports Committee, Tube Division, Electronic Industries Association (hereinafter the "Imports Committee") is an association of manufacturers in the U.S. television industry. The Electronic Industries Association is incorporated in the State of Illinois.

## STATEMENT OF THE CASE

This case raises a fundamental question as to the proper administration of the antidumping and countervailing duty laws which has widespread implications for domestic industries and their workers who are being injured by dumped or subsidized imports.[2] The United States Department of Commerce has estimated that during the period January 1982 to February 1983, $1.5 billion worth of U.S. import trade was subject to either an antidumping or countervailing duty order.[3] According to official Federal Register notices, there are at present approximately 100 antidumping orders or suspension agreements covering articles of commerce from 27 foreign countries, as well as 82 countervailing duty orders or suspension agreements covering articles of commerce from 26 foreign countries. Since January 1, 1980, the effective date of the Trade Agreements Act of 1979, interested domestic parties have filed 135 antidumping and 201 countervailing duty petitions. Existing antidumping and countervailing duty orders encompass a variety of important products from virtually every sector of our economy, including agriculture, chemicals, construction equipment and materials, electronics, textiles

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[2] Although this proceeding involves merchandise which is subject to a formal dumping finding, the legal issues raised herein are equally applicable to subsidized merchandise subject to the assessment of countervailing duties. Both dumping and subsidization are covered by Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671-1677g (Supp. III 1979). The administrative provisions of that law relating to the assessment of duties apply to both antidumping and countervailing duties. 19 U.S.C. § 1675 (Supp. III 1979).

[3] Office of Compliance, Int'l Trade Admin., U.S. Dep't of Commerce, Transactions Report for the U.S. Customs Service (unpublished monthly report, Jan. 1982-Feb. 1983).

and apparel, glass, plastics, carbon and specialty steel, footwear, office equipment and miscellaneous machinery and equipment.

The Secretary of Commerce—relying for the first time in its 60 year history upon section 617 of the Tariff Act of 1930, as amended—asserts that he may circumvent the new and elaborate procedural safeguards included in the Tariff Act of 1930 as amended by the Trade Agreements Act of 1979. Under this asserted authority, the Secretary may compromise antidumping or countervailing duties without consulting, or even providing notice to, the interested domestic parties who filed petitions initiating the proceedings. The exercise of unrestricted power of settlement in the enforcement of a statute enacted for the benefit of domestic industries and their workers, without their participation, fundamentally changes the responsibilities of the Secretary of Commerce under both the antidumping and countervailing duty laws.

**1. Statutory Background**

By statute, the Secretary of Commerce is required to determine whether antidumping duties may be due once imports are found to be sold at less-than-fair-value and causing injury to a domestic industry and its workers. 19 U.S.C. § 161(a) (1976) (repealed 1980); *id.* § 1673 (Supp. III 1979). United States manufacturers or workers may commence administrative proceedings leading to the imposition of such duties by filing petitions with the Secretary and the United States International Trade Commission. Prior to the enactment of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.), interested domestic parties had no right to participate in the administrative

assessment of antidumping duties, and their rights to contest such assessments in court were also very limited.[4]

By 1979, the longstanding default of the United States Department of the Treasury in enforcing the antidumping law was well known to Congress.[5] The failure to assess antidumping duties on television receivers from Japan was perhaps the most notorious example of the Treasury Department's default; indeed, it became somewhat of a *cause celebre* providing much of the motivation for three separate legislative actions designed to reform the administration of the international trade laws.[6]

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[4] Under prior law the only remedy available to interested domestic parties was to file one or more test cases challenging the assessment methodology in the United States Customs Court. 19 U.S.C. § 1516(a) & (c) (1976). But even if the domestic party were victorious, the results of the successful court challenge applied only prospectively to imports of merchandise made after the date of the judicial ruling. Duties on all imports of merchandise made prior to the favorable judicial ruling had to be assessed using the old assessment methodology which had just been successfully challenged. *Id.* § 1516(e) & (g).

[5] The Senate Finance Committee report accompanying the Trade Agreements Act of 1979 refers to the "dismal performance of the Department of the Treasury in assessing special dumping duties in the recent past. . . ." S. Rep. No. 249, 96th Cong., 1st Sess. 76-77, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 462-63. The House Committee on Ways and Means also expressed its dissatisfaction, particularly with the unreasonable delay in the assessment and collection of dumping duties, and questioned whether responsibility for dumping matters should remain at Treasury. *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 24, 69 (1979).

[6] *See, e.g., Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways & Means*, 95th Cong., 2d Sess., 20-51, 60, 77-97 (1978); *Legislation Necessary to Implement the Multilateral Trade Agreement Concluded in Geneva, Switzerland: Hearings Before the Subcomm. on Trade of the House Comm. on Ways & Means*, 96th Cong., 1st Sess.

First, in response to the failure of the Treasury Department to assess and collect antidumping duties, Congress enacted elaborate procedural reforms in the Trade Agreements Act of 1979. These reforms included: (1) the creation of the right of interested domestic parties to participate in the assessment process at the administrative level; and (2) the right to seek judicial review of assessment determinations. A summary of these procedural reforms is set forth in the margin.[7] Second, Con-

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13, 17, 25, 34, 93, 106, 107, 245, 325, 328-30, 332-34, 337-38, 426, 623, 630-32, 646-49 (1979); *Implementation of the Multilateral Trade Negotiations: Hearings Before the Subcomm. on International Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 207-11, 284-85 (1979).

[7] Section 101 of the Trade Agreements Act of 1979 added a new Title VII to the Tariff Act of 1930, 93 Stat. 144, 150, and created or continued the existence of a number of legally protected rights for members of the injured domestic industry and its workers. First, section 731 continued the clear-cut and unequivocal mandate of the prior law that once a finding of dumping is made, "there *shall* be imposed upon such merchandise an antidumping duty. . . ." 19 U.S.C. § 1673 (Supp. III 1979) (emphasis added). *Cf. id.* § 161(a) (1976) (repealed 1980). Second, section 751(a) imposed strict time limitations on the administering authority, mandating that at least once every 12 months "the administering authority . . . *shall* . . . review and determine . . . the amount of any antidumping duty." *Id.* § 1675(a)(1) (Supp. III 1979) (emphasis added). Third, interested parties were given the right to a hearing during this annual administrative determination of antidumping duties, *id.* § 1675(d), together with access to confidential information subject to a protective order, *id.* § 1677f(c)(1), in order to insure meaningful participation in the administrative process. Finally, section 516A gave interested parties expanded rights of judicial review to challenge determinations with respect to the assessment of antidumping duties, *id.* § 1516a, together with the right, under appropriate circumstances, to obtain injunctive relief to prevent the liquidation of entries prior to the conclusion of judical review of the assessment determination. *Id.* § 1516a(c)(2). These statutory reforms were specifically designed to

gressional dissatisfaction with Treasury's administration of the law led to the shift in antidumping enforcement responsibility to the Commerce Department.[8] Finally, Congress created the new United States Court of International Trade and conferred upon that court both the subject matter jurisdiction and the power necessary to enforce the new checks on administrative discretion in international trade matters.[9]

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protect the rights of domestic interested parties—the intended beneficiaries of our antidumping law. H.R. Rep. No. 317, *supra* at 72, 179-83; S. Rep. No. 249, *supra* at 75-77, 79-81, 244-56, *reprinted in* 1979 U.S. Code Cong. & Ad. News at 461-63, 465-67, 629-42.

[8] Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), *reprinted in* 19 U.S.C. § 2171 note (Supp. III 1979); Exec. Order No. 12188, 45 Fed. Reg. 989 (1980). Both the Senate and House reports dealing with Reorganization Plan No. 3 of 1979 were critical of the Treasury Department's administration of the antidumping law. S. Rep. No. 402, 96th Cong., 1st Sess. 12 (1979); H.R. Rep. No. 585, 96th Cong., 1st Sess. 6 (1979).

[9] The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified in scattered sections of 19, 28 U.S.C.), vested the new court with exclusive jurisdiction over international trade matters, 28 U.S.C. § 1581 (Supp. IV 1980), and granted it full equity powers and all of the prerogatives of district courts of the United States, *id.* § 1585.

Chief Judge Edward D. Re of the U.S. Customs Court was one of the leading proponents of the Customs Courts Act of 1980. In Congressional testimony on H.R. 6394, the bill which eventually became the Customs Courts Act of 1980, Chief Judge Re testified that the new Court of International Trade would be able to subject "[t]hose agencies which deal with importations . . . to the same policy of judicial review as Congress has provided for other administrative agencies. . . . Persons adversely affected or aggrieved by agency actions arising out of import transactions are entitled to the same access to judicial review and judicial remedies as Congress has made available for persons aggrieved by actions of other agencies." *Customs Courts Act of 1980: Hearing on H.R. 6394 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 24 (1980).

**2. The Secretary's Decision**

The importation of television receivers from Japan has been subject to a formal dumping finding by the Secretary of the Treasury since March 8, 1971. 5 Cust. Bull. 151 (1971); 36 Fed. Reg. 4597 (1971). At the time responsibility for the administration of the antidumping law was transferred to the Secretary of Commerce in January of 1980, the final assessment of antidumping duties on the $1.8 billion worth of television receivers which had been imported from Japan between 1972 and March 31, 1979 had not been completed. The procedures of the new law applied to the assessment of antidumping duties on the great bulk of those imports.[10] Nevertheless, the Secretary of Commerce, following secret negotiations with Japanese television manufacturers and various importing interests, but without giving notice or an opportunity to be heard to interested domestic parties, agreed not to make a formal determination of antidumping duties as required by the 1979 amendments. Instead, the Secretary agreed to accept lump sum payments totaling approxi-

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[10] Section 106 of the Trade Agreements Act of 1979, 93 Stat. at 193, provided that formal dumping findings existing on the effective date of the new law would remain in effect subject to review under new section 751 of the Tariff Act of 1930, 19 U.S.C. § 1675 (Supp. III 1979). Section 1002(b)(3) of the Trade Agreements Act of 1979 provided that the judicial review procedures of the new law would be applicable to entries of merchandise "if the assessment was made after the effective date." 19 U.S.C. § 1516a note (Supp. III 1979). Because the Treasury Department had not even begun the assessment process on the great bulk of television receivers imported after mid-1975, the transition rules of the Trade Agreements Act of 1979 required that the margins of dumping on those importations be ascertained under the greatly expanded review provisions of the new law with full participation by interested domestic parties. *See* note 7 *supra*.

mately $66 million in lieu of what petitioners believe by law should have been hundreds of millions of dollars of antidumping duties.[11] The Secretary of Commerce relied upon section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976) (hereinafter "section 617") (App. 35a), as the authority for entering into these settlement agreements.

### 3. The Ruling Of The Court Below

Petitioners sought review of the Secretary's decision in the newly created United States Court of International Trade pursuant to 28 U.S.C. § 1581(i) (Supp. IV 1980). Following the decision of the United States Court of Customs and Patent Appeals ("CCPA") in *Montgomery Ward & Co.* v. *Zenith Radio Corp.*,[12] petitioners filed an

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[11] The United States Customs Service had previously estimated that total antidumping duties on television receivers imported prior to April of 1977 could be as much as $382 million. Members of COMPACT estimate that the total amount of antidumping duties which could be assessed on all imports of television receivers made up to March 31, 1979 could be as high as $600 million.

[12] 673 F.2d 1254 (CCPA 1982), *reh'g denied*, No. 81-24 (CCPA order dated May 13, 1982), *cert. denied sub nom., Zenith Radio Corp.* v. *United States*, 103 S.Ct. 256 (1982) (hereinafter *Montgomery Ward*). The CCPA held that the Secretary of Commerce could use the broad provisions of section 617 to circumvent the elaborate procedural safeguards of the 1979 legislation and that the exercise of authority under that statute was a matter committed by law to agency discretion. The subject settlement agreements were held to be immune from judicial scrutiny except for review of compliance with the procedures of section 617. *Id.* at 1261. Because in the court's view the plaintiff, Zenith Radio Corporation, had not alleged procedural irregularity, *id.* at 1265, and Zenith's allegations of bad faith were deemed to be "no more than perfunctory," *id.* at 1264, the CCPA dismissed Zenith's action for lack of subject matter jurisdiction. *Id.* at 1265.

Amended Complaint (App. 21a-32a). That Amended Complaint alleged that the authority contained in section 617 did not authorize the Secretary to circumvent his responsibilities under the specific provisions of the 1979 amendments to the antidumping law. Petitioners claim that the use of section 617 in antidumping proceedings without at least giving the injured domestic industry and its workers the opportunity for notice and comment is repugnant to the specific provisions of the 1979 amendments to the antidumping law. The Amended Complaint further alleged that even if section 617 did govern, the Secretary's conduct was unlawful for failure to comply with the required procedures of that section.

With regard to the applicability of the 1979 amendments to the Tariff Act of 1930, the Federal Circuit held that this legislation neither altered nor amended the Secretary's power under section 617 (App. 4a).

The Amended Complaint, designed to cure specific deficiencies found by the CCPA in the pleadings filed in the *Montgomery Ward* litigation, also alleged that, even assuming that the Secretary was authorized to compromise antidumping duties under section 617, the Secretary's purported compliance with the procedures of section 617 was a sham and that the entire compromise process was the product of bad faith. The Federal Circuit held that it had no jurisdiction to inquire into those allegations.

Section 617 provides that before the Secretary may compromise a claim, he must be presented with the report of an attorney having charge of the claim proposed for compromise. That report must recite the facts upon which the claim is based, the probabilities of recovery and the terms upon which the claim may be compromised. Further, the General Counsel must recommend the compromise (App. 35a).

Petitioners allege in Counts III and V that the report and recommendation supposedly presented to the Secretary as the basis for his compromise decision were prepared in bad faith and were intentionally contrived by his subordinates by means of false and misleading statements of fact and erroneous propositions of law to justify a settlement that had been preordained for political reasons. The details as to how this bad faith manifested itself in the specific actions of the Secretary's advisors are set forth in the Amended Complaint (App. 22a-25a, 27a-32a). Petitioners further contend (Count IV, App. 25a-27a) that there is no indication in the administrative record that the Secretary ever received or read the report and recommendation required by section 617 or that he ever personally approved the proposed settlements. Rather, petitioners assert that the Secretary could not have received the required report and recommendation in time to base any decision upon them.[13] Petitioners allege,

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[13] The General Counsel dictated a memorandum of transmittal to the Secretary for the report and recommendation at 2:30 a.m. on April 28, 1980. He left the dictation for his personal secretary to type when she came to work that day. Respondent asserts that the Secretary made his decision to compromise shortly after 9:00 a.m. on the same day. This sequence would not have permitted the memorandum to be typed, and the report and recommendation to be transmitted to and reviewed by the Secretary, before his claimed settlement decision. In fact, there is no written indication in the administrative record that the Secretary ever had before him the report and recommendation required by section 617 before he made his alleged decision to compromise. Moreover, the Secretary had notified the President of the settlement the week before his alleged decision and prior to the preparation and submission of the required report and recommendation. (App. 26a-27a). At no time did respondent ever attempt to establish, by affidavit or otherwise, the sequence of events which took place on the morning of April 28, 1980. Petitioners' allegations were more than sufficient to rebut the presumption of administrative

in essence, that compliance with the procedures of section 617 was a sham and that, even if the statutorily-mandated report and recommendation had been presented to the Secretary prior to a decision, the report and recommendation were so materially defective that the Secretary's compromise decision must be set aside.

The Federal Circuit held that judicial review of a decision by the Secretary under section 617 was limited to inquiring into whether a report and recommendation were received by the Secretary and whether the Secretary actually made the settlement decision (App. 7a). However, the court relied upon the presumption of administrative regularity to conclude that the required procedures were satisfied, and it refused to inquire into petitioners' allegations that the administrative record did not establish what documents (if any) were presented to the Secretary, when (if at all) he may have received them, and whether he himself had actually made the settlement decision. It refused to entertain petitioners' allegations that the alleged submission of the report and recommendation was a sham and that the report and recommendation were prepared in bad faith. The court refused to examine the contents of the specific report and recommendation allegedly transmitted to the Secretary because, in its view, petitioners' allegations of bad faith required an inquiry into the Secretary's motivation, which inquiry was beyond its subject matter jurisdiction. The inadequacy of the administrative record, coupled with factual allegations of impropriety, should have com-

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regularity relied upon by the court below and to prompt further inquiry into the facts. This is especially true here where the Secretary issued no formal findings; indeed, where he did not even sign or initial a document to evidence his alleged decision. *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978).

pelled the court below to inquire further. However, the Federal Circuit refused to permit an examination into the factual allegations that compliance with statutorily-mandated procedures was a sham and that the entire decision-making process was carried out in bad faith on the grounds that the allegations were "not proper for judicial inquiry" (App. 5a) or review was unnecessary because of the presumption of administrative regularity.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Nullifies The Congressional Reforms Sought To Be Effectuated By The 1979 Amendments To The Antidumping And Countervailing Duty Laws

This case raises an issue of fundamental importance under the antidumping and countervailing duty laws. Congressional dissatisfaction with the failure of the Treasury Department to assess and collect antidumping duties in a timely fashion prompted the 96th Congress to enact the most sweeping reforms in the history of our international trade laws. Administrative authority over antidumping and countervailing duty matters was stripped from the Secretary of the Treasury and vested in the Secretary of Commerce. The previously broad authority of the Secretary of the Treasury over duty assessments was substantially circumscribed by elaborate procedural safeguards and by the appeal rights bestowed upon interested domestic parties. Finally, a new court was created and given vastly expanded powers so that it would provide a check on agency action. With one stroke of a pen the Secretary of Commerce swept aside these reforms and administered the antidumping law as if the Trade Agreements Act of 1979 had never been enacted.

The decision below violates well settled principles of statutory construction. Section 617, which lay dormant

for almost 60 years, is repugnant to the procedural requirements imposed by the 1979 amendments to the antidumping law.[14] In view of the rights of interested domestic parties to participate in and appeal from the annual determination of antidumping duties, the compromise of antidumping duties can hardly be considered to be a strictly private matter between the importer-taxpayer and the government amenable to compromise under an

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[14] Section 617, which has for its purpose the protection of revenue for the federal treasury, was first enacted in modern form as part of the Tariff Act of 1922. 42 Stat. 858 (1922). Treasury Department records confirm that not once in the nearly 60 year history of this provision did the Secretary of the Treasury ever use it to compromise antidumping duties. Moreover, it is clear that the 96th Congress never anticipated—much less intended—that the outmoded language of section 617 would be used to circumvent the procedures of new section 751(a) of the Tariff Act of 1930, 19 U.S.C. § 1675(a) (Supp. III 1979). The legislative history of the Trade Agreements Act of 1979 does not contain a single reference to section 617. Given that this provision had never been used to compromise antidumping duties, there is no reason to believe that Congress anticipated its use when it was enacting elaborate measures to curtail Executive Branch discretion in the antidumping and countervailing duty assessment process.

The first time the 96th Congress was confronted with the possible use of section 617 in an antidumping proceeding occurred after the Trade Agreements Act of 1979 had become law, when the President proposed to transfer authority under section 617 to the Secretary of Commerce as part of Reorganization Plan No. 3 of 1979. *See* note 8 *supra*. The legislative history of this reorganization plan discloses that both houses of Congress specifically disclaimed any notion that failure to disapprove Reorganization Plan No. 3 carried with it the implication that Congress believed that section 617 was applicable to the assessment of antidumping duties. H.R. Rep. No. 585, *supra* at 7; S. Rep. No. 402, *supra* at 41. Reorganization Plan No. 3 of 1979 did not constitute an affirmative grant of settlement authority in antidumping duty assessment proceedings.

archaic housekeeping provision of the tariff laws. In the face of this repugnancy, the specific provisions of the 1979 amendments should prevail over the general provisions of the earlier enacted statute. *Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). It is not unusual that exceptions to the otherwise all-inclusive language of one statute (section 617) are found in another statute (the Trade Agreements Act of 1979) dealing specifically with particular situations to which the more general statute might otherwise apply. *Muniz* v. *Hoffman*, 422 U.S. 454, 458 (1975). The general compromise authority of section 617 must yield to the specific rights of domestic parties and the responsibilities of the Secretary under the 1979 legislation.

At the very least, the court below should have attempted to harmonize these conflicting provisions on the basis of the rule of statutory construction that courts must give full effect to conflicting statutes addressing the same transaction or subject. *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 618-19 (1980). As this Court instructed in *Morton* v. *Mancari:* "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." 417 U.S. at 551. Under this principle a court must attempt to effectuate both the antidumping law and section 617 to the fullest extent possible if it deems them "capable of co-existence."

Neither the Secretary nor the courts below attempted such harmonization. Surely if these provisions are to co-exist there must be some implied restrictions on the Secretary's exercise of compromise authority arising out of the 1979 legislation. The Secretary could have permitted interested domestic parties to participate in the

settlement exercise or, at the very least, he could have provided them with notice and the opportunity to be heard. It is clear, however, that the 96th Congress had no intention of permitting the Secretary to act as if the 1979 reforms did not exist.

Petitioners do not challenge the strong public policy considerations which favor the settlement of controversies. Petitioners do attack, and request review of, the procedures employed in achieving settlement. Fairness and statutory provisions dictate that all of the parties should have notice and the opportunity to comment upon the terms of settlement. This case will give the Court the opportunity of addressing important questions with respect to the authority of courts in supervising the role of federal agencies who seek to enforce through compromise a federal statute enacted for the benefit and protection of a specific class.[15]

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[15] The Federal Circuit's approach in this litigation conflicts with decisions of other circuits with respect to the reviewability of administrative settlements affecting the interests of third parties. In *Local 1219, American Federation of Government Employees* v. *Donovan*, 683 F.2d 511 (D.C. Cir. 1982), an agency concluded a settlement agreement with a union resolving charges of unfair election procedures. *Id.* at 513-14. Affected union members not party to the settlement were permitted to challenge the merits of the settlement. *Id.* at 514.

Other circuits have ruled in various contexts that settlements executed by the government in enforcement of a statute are amenable to judicial review with the participation of affected third parties. *See, e.g., United States* v. *City of Miami*, 614 F.2d 1322 (5th Cir. 1980), *rev'd in part*, 664 F.2d 435 (5th Cir. 1981) (*en banc*) (employment discrimination by city police force); *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313 (D.C. Cir. 1977) (employment discrimination by private employers). *See also Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 141 (1967); *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (antitrust consent decrees) (third party intervention allowed where appearance of bad faith by government).

**2. The Decision Below Raises Important Questions Respecting The Jurisdiction Of The Court Of International Trade To Review A Decision By The Secretary Of Commerce Alleged To Have Been Made On The Basis Of Procedures Which Were A Sham and Conducted In Bad Faith**

Even assuming that section 617 authorized settlement, the court below erred in holding that it had no jurisdiction to review allegations that compliance with that provision's procedures was a sham and carried out in bad faith. The decision raises disturbing questions concerning the unwillingness of the new Federal Circuit and the new Court of International Trade to protect the integrity of the administrative process. Left unreviewed, it stands as a clear precedent that, at least in the administration of the antidumping and countervailing duty laws, inquiry into sham compliance with statutory procedures is "not proper for judicial inquiry" (App. 5a).

Petitioners' Amended Complaint sets forth detailed and specific allegations of bad faith related to the preparation of the report and recommendation required by section 617 before the Secretary may compromise claims (App. 22a-25a, 27a-32a). Contrary to the assertion of the Federal Circuit, the thrust of these allegations is not simply that petitioners disagreed with what was reported to the Secretary as the range of potential antidumping duties. Rather, petitioners alleged that the entire process was a sham and that the record was fraudulently constructed in order to justify a settlement which had been preordained for political reasons. Review of petitioners' allegations would not require a court to probe the Secretary's mental processes or second-guess the substance of his decision. It would, however, have required the court to insure that a proper record was submitted to the Secretary and that the record provided him with all of the necessary tools for an informed decision.

In the *Montgomery Ward* decision, the CCPA characterized Zenith's allegations of bad faith as "no more than perfunctory" and ordered the action dismissed for lack of subject matter jurisdiction. *Montgomery Ward*, 673 F.2d at 1264. Petitioners' detailed and highly specific Amended Complaint was designed to cure the deficiencies found by the CCPA in Zenith's pleadings and was based upon documentary and testamentary evidence obtained through discovery. Because of the procedural posture of this case, petitioners' allegations are essentially uncontested and they should have been deemed true and read in a light favorable to petitioners.[16] The Federal Circuit mischaracterized petitioners' allegations of bad faith by asserting that petitioners were merely attempting to persuade the Court of International Trade to inquire into the motives of the General Counsel because petitioners disagreed with his estimate of potential antidumping duties (App. 8a). A fair reading of the Amended Complaint discloses far more than an attack on the General Counsel's motives as asserted by the Federal Circuit.

The Federal Circuit's stubborn refusal to permit inquiry into the conduct of federal officials where there are substantial allegations of bad faith conflicts with the approach taken by this Court and other circuits, and ought to be reviewed. The proposition that federal courts lack

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[16] Since Counts III and V essentially were dismissed for lack of subject matter jurisdiction, the allegations of those counts must be deemed true and construed in a light favorable to the petitioners. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Jenkins* v. *McKeithen*, 395 U.S. 411 (1969). 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357 at 594-96 (1969). On certiorari, this Court will be in a position to determine whether petitioners could prevail on any set of facts which might be proved within the four corners of their pleading.

subject matter jurisdiction to inquire into agency action "motivated by improper factors" is, in itself, highly dubious. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249 (1980). But where, as here, the allegations transcend a simple attack on motives and assert what is tantamount to the fraudulent preparation of a statutorily-mandated report and recommendation, federal courts not only have the authority to entertain such allegations, they have the responsibility to do so as well.[17] Even if the Secretary of Commerce were ultimately found to have the broadest discretion under section 617, discretion uninhibited in any way by his responsibilities under the antidumping law, the existence of that discretion should not be a bar to judicial inquiry into non-frivolous allegations of bad faith and impropriety: "once there has been a *prima facie* demonstration of impropriety the courts will inquire into the administrative process in order to insure that the decision making was informed, unbiased, and personal." *KFC National Management Corp.* v. *N.L.R.B.*, 497

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[17] A decision that is "plainly beyond the bounds of the Act [or] clearly defiant of the Act," *Dunlop* v. *Bachowski*, 421 U.S. 560, 574 (1975) or "motivated by improper factors," *Marshall* v. *Jerrico, Inc.*, 446 U.S. at 249 (1980), cannot be insulated from judicial scrutiny merely because the administrator is granted the broadest of discretion. As one scholar has put it, "the existence of broad discretion is not alone sufficient to bar review; there is no such thing as 'absolute' discretion, a discretion so broad as to make abuse literally inconceivable." Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367, 382 (1968). The proper role of a reviewing court in overseeing the administrative process is not to insure "correct" decisions but to "preserve the integrity of the decision-making process." *Barnes Freight Line, Inc.* v. *ICC*, 569 F.2d 912, 923-24 (5th Cir. 1978).

F.2d 298, 305 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087 (1976) (citations omitted). The discretion which may accompany the authority of public officials to settle disputes and to compromise claims should not be used as a shield to conceal wrongdoing. The decision of the Federal Circuit is inconsistent with the vast weight of authority dealing with the role of the courts in addressing allegations of sham and bad faith.

The new Court of Appeals for the Federal Circuit decides appeals from some of the most important litigation involving the federal government. In matters involving our international trade laws it will hear *all* of such appeals. Moreover, its decision in this matter will undoubtedly establish a tone and direction that the new Court of International Trade will follow for years to come. For these reasons it is particularly timely for this Court to provide guidance so that the recently enacted Congressional reforms may be promptly and properly carried out.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1983

# APPENDIX

# APPENDIX A

## OPINIONS BELOW

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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**Appeal No. 83-578**

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COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

*Appellants*,

v.

THE UNITED STATES,

*Appellee*.

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Decided: May 2, 1983

Before: MARKEY, *Chief Judge*, DAVIS, NICHOLS, BALDWIN and NIES, *Circuit Judges*.

NIES, Circuit Judge.

This appeal is from the grant of summary judgment by the Court of International Trade (trial court) in favor of the Government on all counts of the amended complaint of appellants, Committee to Preserve American Color Television and The Imports Committee, Tube Division, Electronic Industries Association (COMPACT), to the extent that the complaint raised justiciable issues. Appellants seek to set aside settlement agreements concerning dumping duties on entries of certain television receivers imported from Japan. The jurisdiction of this court is founded on 28 U.S.C. § 1295(a)(5). Having considered each of the matters asserted by COMPACT as error in the decision of the Court of International Trade, as well as the arguments of the amici curiae, we affirm.

## I

### *Background*

On April 28, 1980, the Government announced that the Secretary of Commerce had reached agreement with importers of Japanese television receivers to compromise claims for dumping duty assessments arising under T.D. 71-76, 5 Cust. Bull. 151 (1971), on receivers entered between March 1972 and March 31, 1979, and on that date executed settlement agreements with a number of the importers.

Upon learning of these settlement agreements, one of the amici to this appeal, Zenith Radio Corporation (Zenith), filed suit in the United States Customs Court, now the United States Court of International Trade, seeking to enjoin their implementation. Subsequently, appellants herein, COMPACT, filed a similar complaint containing allegations virtually identical to those made by Zenith. Consolidation of the suits has been opposed by Zenith and COMPACT and the cases have proceeded slightly out of phase with each other.

The original complaints asserted that the Secretary of Commerce lacked authority to settle dumping duty claims (first count) and that, even if such power existed, it was being exercised in bad faith (second count). Summary judgment was granted in favor of the Government on count I. *Zenith Radio Corp.* v. *Unites States*, 1 CIT 180, 509 F. Supp. 1282 (1981), and *COMPACT* v. *United States*, 2 CIT ___, 527 F. Supp. 341 (1981).

In the initial stages of the *Zenith* case, a dispute arose over discovery relating to information supplied to the Government by a non-party, Montgomery Ward & Co. Inc. (Wards). Wards appealed the court's order which directed the Government to turn over Wards' confidential business records to Zenith. The appeal was heard by the United States Court of Customs and Patent Appeals, one of the predecessors of this court. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254 (CCPA), *reh'g denied*, No. 81-24 (CCPA Order entered May 13, 1982), *cert. denied sub nom. Zenith Radio Corp.* v.

*United States*, 103 S.Ct. 256 (1982) (hereinafter "*Montgomery Ward*").

In *Montgomery Ward* the court held that the Secretary possessed the requisite authority to settle dumping duty claims under section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976) (hereinafter "section 617"). 673 F.2d at 1259-60.

The court further held that, in challenging the exercise of that authority, Zenith's complaint was directed to matters outside the permissible scope of judicial review, and that "[a]t most, Zenith may press inquiry into whether the procedural requirements for settlement [set out in section 617] were satisfied." *Id.* at 1264. It was, thus, ordered that the complaint filed by Zenith be dismissed for lack of jurisdiction. *Id.* at 1265. Further details regarding the subject settlements appear in *Montgomery Ward* and will not be recounted here.

## II

After the Supreme Court denied certiorari in *Montgomery Ward*, Zenith and COMPACT were granted leave to amend their complaints. *Zenith Radio Corp.* v. *United States*, 3 CIT ____, Slip Op. 82-98, 16 Cust. Bull. and Dec., No. 49, 47 (1982); *COMPACT* v. *United States*, 3 CIT ____, 551 F. Supp. 1142, 1143 n.1 (1982). Both amended complaints urge five grounds for enjoining the subject settlement agreements. Again, the two law suits were not consolidated (Zenith appears here as amicus curiae).

The Court of International Trade, relying on *Montgomery Ward*, denied COMPACT's motion for a preliminary injunction, *COMPACT* v. *United States*, 3 CIT ____, 551 F. Supp. 1142 (1982), and consolidated the hearing on the motion with trial on the merits and granted judgment in favor of the Government on all counts. *COMPACT* v. *United States*, 3 CIT ____, Slip Op. 82-101, 16 Cust. Bull. and Dec., No. 49, 55 (1982). This appeal followed.

## III
### A

Count I raises anew the challenge to the Secretary's authority to "compromise the assessment of antidumping duties" under section 617. The Court of International Trade held that consideration of that issue was precluded under the doctrine of *stare decisis*.

It is asserted here that the issue of whether the Secretary had settlement authority was neither before the court, nor decided, in *Montgomery Ward*. COMPACT would construe the *Montgomery Ward* decision as though the appeals court had merely been "assuming the power to settle existed in the first instance."

Contrary to appellants' view, the decision of the court was explicit inasmuch as the resolution of this issue was a necessary predicate to its decision on the jurisdictional question. Arguments on the issue of the Secretary's power were of record and considered prior to the *Montgomery Ward* decision, were considered again on the petition for rehearing (in which COMPACT participated as amicus curiae), and have been reconsidered in this appeal. We remain unpersuaded that section 617 does not include the power to settle dumping duty claims, or that the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), altered or limited that power.

### B

Counts II-IV purport to allege violations of the procedural mandates of section 617. These allegations were considered by the trial court in accordance with the decision in *Montgomery Ward*.

The provisions of section 617 are as follows:

> Upon a report by a customs officer, district attorney, United States Attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is hereby

authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

The responsibility for administration of the antidumping laws, and specifically all functions of the Secretary of the Treasury and the General Counsel of the Department of the Treasury, were transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69273, 69275, 93 Stat. 1381 (1979), including specifically, the authority to compromise claims under section 617 (§ 5(a)(1)(G)). *See* 19 U.S.C. § 2171 note (Supp. III 1979).

The Court of International Trade carefully reviewed each deficiency asserted by COMPACT and found that the procedures had been satisfied and that certain of the deficiencies asserted were not proper for judicial inquiry. We find no error in the trial court's legal standards and agree with its conclusion on each of these matters.

C

Count II alleges that there was no "report" which satisfies the opening clause of section 617. (Section 617 report.)

The administrative record discloses a comprehensive memorandum dated April 28, 1980, from Homer E. Moyer, Jr., the General Counsel of the Department of Commerce to the Secretary (together with a letter of transmittal of the same date recommending settlement) which, COMPACT does not dispute, addresses each of the criteria required in a section 617 report.*

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*As one of the attachments to that memorandum, the General Counsel included a status report on the subject dumping proceedings, dated February 19, 1980, from the Commissioner of Customs to the Acting Under Secretary of Commerce prepared and sent pursuant to the latter's request. While that status report also addresses the criteria of a section 617 report, COMPACT argues that technically the Commissioner did not have "charge" of the claims which were being settled by the Secretary of Commerce. We do not agree, under

COMPACT urges that this report does not satisfy section 617 for the reason that the General Counsel *himself* is not qualified under statute to make the report. COMPACT argues that it must be prepared by some "other person." The trial court reasoned that this argument "leads to the incongruous result that although one of Mr. Moyer's subordinates could serve as a section 617 'special attorney,' and could prepare a section 617 report under the supervision of Mr. Moyer, Mr. Moyer himself could not do so." *COMPACT* v. *United States*, 3 CIT at ____, 551 F. Supp. at 1145. While procedures set forth in section 617 must be fully adhered to, we agree with the trial judge that "[n]o rule of construction necessitates . . . acceptance of an interpretation resulting in patently absurd consequences." *Id.*, and cases cited.

COMPACT also argues that the report is defective because it treats all of the claims as a class rather than treating each importer separately. Given the comprehensive class-wide nature of the settlement, we agree with the trial court that class-wide comprehensive treatment of the claims in the report is permissible. *Id.* at 1145-46.

D

Count III alleges that the General Counsel's recommendation contained "statements and opinions of law and fact that were false, misleading, and not supported by the record upon which the Secretary's decision was required to be based." COMPACT does not seek to set aside the settlement because the recommendation was not made. Rather, the court is asked to review the contents of that recommendation for accuracy and validity. Such an inquiry falls squarely within the proscription of *Montgomery Ward*, 673 F.2d 1263-64, and the trial court properly refused to undertake the task.

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the circumstances here, where the Commissioner's report was specifically prepared in response to a request from Commerce for use in connection with settlement of these claims, that the report was not by an officer "having charge."

## E

Court IV alleges that the decision to settle was made by the Secretary before he received the General Counsel's recommendation. COMPACT further alleges that the "administrative record . . . does not reflect whether the Secretary actually received and read the General Counsel's recommendation." Finally, COMPACT asserts that even if received and read, the Secretary had insufficient time to comprehend the facts of a case of this "magnitude and complexity." These contentions must fail.

Without question, the Secretary should make a reasoned decision based on all of the required information, *see, e.g., Calvert Cliffs Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971). However, that only a few hours were available between receipt of the report and execution of settlement agreements raises no presumption that he had not done so. *National Nutritional Foods Association* v. *FDA*, 491 F.2d 1141, 1144-45 (2d Cir. 1974). Moreover, COMPACT does not, and could not, assert that the report was the Secretary's introduction to the case. Without question he had been monitoring developments closely. The record precludes any inference that the Secretary was uninformed.

The Supreme Court has instructed that it would be beyond the proper role of the courts to inquire of the Secretary what weight he gave to the various factors in reaching his decision here, *United States* v. *Morgan*, 313 U.S. 409, 421-22 (1941) (*Morgan IV*), and, in any event, the Secretary is not limited solely to the factors explicated in these reports. *Montgomery Ward*, 673 F.2d at 1264. The statute requires that settlement be entered into only after the necessary reports are received by the Secretary and that the Secretary make the settlement decision. These requirements are clearly satisfied here.

## IV

Count V alleges that the exercise of settlement authority was "undertaken in bad faith and in conscious disregard for the procedures mandated by [section 617]." COMPACT asserts

that the General Counsel's recommendation understated the maximum amount of duties the Government might collect absent settlement and, further, that he failed to inform the Secretary that the duties could be higher if domestic producers successfully challenged the methodology used by the Commerce Department in the duty calculations.

With respect to possible differences in the figures supplied by the General Counsel, the court in *Montgomery Ward* held, 673 F.2d at 1264, "[p]roving that the estimate in the report . . . was lower than what Zenith considers reasonable does not destroy the lawfulness of [*the Secretary's* ] decision." (Emphasis added.) The trial court, as it also did with respect to count III, correctly declined COMPACT's invitation to inquire into the General Counsel's motivation.

**Conclusion**

The judgment of the Court of International Trade is *affirmed*. The injunction pending appeal is dissolved.

**AFFIRMED**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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**Appeal No. 83-578**

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COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,
*Plaintiffs-Appellants,*

v.

THE UNITED STATES,
*Defendant-Appellee.*

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**ORDER**

Upon reading and filing the motion of appellants for a stay of mandate for 30 days, and all other pleadings, papers and proceedings had herein, it is hereby

ORDERED that:

1. The motion of plaintiffs-appellants for a stay of mandate is granted;

2. The mandate of this court shall not issue for 30 days from the date of this order;

3. The injunction pending appeal entered by this court on December 2, 1982, is and remains effective for a period of 30 days from the date of this order;

4. The parties shall advise the court by June 1, 1983, of the amount and conditions of an appropriate bond with respect to any continuance of the injunction.

/s/ Helen W. Nies
HELEN W. NIES, Circuit Judge

Washington, D.C.
May 12, 1983

UNITED STATES COURT OF INTERNATIONAL TRADE

**Court No. 81-3-00258**

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

*Appellants*,

v.

UNITED STATES,

*Appellee*.

Decided: Nov. 15, 1982

MALETZ, Judge:

This matter is before the court on plaintiffs' motion to obtain a preliminary injunction to restrain the Government from implementing the terms of settlement agreements entered into on April 28, 1980 between the Secretary of Commerce and various importers of television receivers manufactured in Japan and subject to an antidumping duty finding, T.D. 71-76.[1] The Secretary was authorized to enter into these agreements by section 617 of the Tariff Act of 1930, 19 U.S.C. § 1617 (1976), which provides:

> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise

[1] Pursuant to rule 15(a) of the rules of this court, plaintiffs' motion for leave to amend their complaint is hereby granted since, in the court's view, the interests of justice so require. See *Foman* v. *Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.[2]

Essentually, plaintiffs claim in their amended complaint that the Government violated the procedural requirements of section 617. For the reasons that follow, the court concludes that there is little, if any, likelihood that plaintiffs will prevail on the merits of this contention and, accordingly, their motion for a preliminary injunction is denied.

***Background***

On May 8, 1980 the Zenith Radio Corporation (Zenith) instituted an action in this court challenging the validity of the settlement agreements here in issue on two grounds. *Zenith Radio Corporation* v. *United States*, No. 80-5-00861. The *Zenith* complaint alleged that the agreements were unlawful because the Secretary lacked the authority to enter into such agreements or, alternatively, if he had the proper authority, he acted in bad faith in entering into them. On December 9, 1980, this court issued a preliminary injunction on the basis of Zenith's allegations of bad faith. *Zenith Radio Corporation* v. *United States*, 1 CIT 53, 505 F.Supp. 216.

On March 9, 1981, plaintiffs instituted the present action. Their complaint is in all material respects identical to the complaint filed in *Zenith*. On November 18, 1981, this court granted the Government's motion for partial summary judgment on plaintiffs' first cause of action which also alleged that the Secretary lacked the authority to enter into the settlement agreements. *COMPACT* v. *United States*, 2 CIT ____, 527 F.Supp. 341.[3]

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[2] Responsibility for administration of the antidumping laws, including the authority to compromise claims, was transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, 44 Fed.Reg. 69273.

[3] The same disposition was previously made on Zenith's first cause of action. *Zenith Radio Corporation* v. *United States*, 1 CIT 180, 509 F.Supp. 1282 (1981).

On March 11, 1982, the Court of Customs and Patent Appeals (CCPA) issued an opinion in an appeal arising out of a discovery dispute in *Zenith. Montgomery Ward & Co., Inc.* v. *Zenith Radio Corporation*, 673 F.2d 1254 (1982), *cert. denied sub nom. Zenith Radio Corporation* v. *United States*, ____ U.S. ____, 103 S.Ct. 256, 74 L.Ed.2d 200 (1982). The CCPA held in *Montgomery Ward* that the exercise of the Secretary's compromise authority under 19 U.S.C. § 1617 was a matter committed by law to agency discretion. *Id.* at 1262, 1263. The CCPA further held that any legal wrong to Zenith under 19 U.S.C. § 1617 could only be based on a violation of the procedures set forth in that section. *Id.* Accordingly, the substance, merits or motives for entering into the settlement agreements were held to be outside the scope of judicial review. *Id.* Hence, the *Zenith* case was remanded to this court with directions to dismiss for lack of jurisdiction. *Id.* at 1265.

Following the denial of Zenith's petition for a writ of certiorari, plaintiffs filed the present motions for leave to amend their complaint and for a preliminary injunction.

***Opinion***

**I**

The factors utilized in considering a request for a preliminary injunction are set out in the leading case of *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C.Cir.1958). There the court held that in order to prevail the petitioner must show (1) that there is a substantial likelihood that the petitioner will prevail on the merits; (2) that without the relief requested the petitioner will be irreparably injured; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested. In amplifying its earlier decision in *Virginia Petroleum*, the District of Columbia Circuit Court of Appeals noted in *Washington Metropolitan Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (1977), that substantial likelihood of success on the merits is not required to be established with mathematical

probability. *Id.* at 843. *See also, e.g., S.J. Stile Associates, Ltd.* v. *Snyder*, 646 F.2d 522 (CCPA 1981). Since the court concludes here that there is little, if any, likelihood that plaintiffs will succeed on the merits of their amended complaint, consideration of the other three factors is unnecessary.

II

Plaintiffs' amended complaint is comprised of five counts. Count I is in all material respects identical to the first cause of action in their original complaint which alleged that the Secretary lacked authority under section 617 to enter into the settlement agreements. In *Montgomery Ward*, however, that issue was decided adversely to this contention. Count II alleges that no report as called for in section 617 was prepared. Count III alleges procedural irregularities in connection with the recommendation of the General Counsel of the Department of Commerce to the Secretary. Count IV alleges a failure on the part of the Secretary to consider the report and recommendation. Finally, Count V alleges bad faith compliance with the section 617 procedures. Since *Montgomery Ward* is stare decisis with respect to the issue in Count I, the court will limit its consideration to the allegations contained in Counts II through V of plaintiffs' amended complaint.

A

In Count II plaintiffs challenge the sufficiency of the purported section 617 report in three respects. First, plaintiffs assert, *a* report is to be submitted to the Secretary of Commerce which contains (1) the facts upon which the claim is based, (2) the probabilities of recovery, and (3) the terms upon which the claim may be compromised. No single, sufficiently detailed, comprehensive report was submitted, plaintiffs contend. Second, plaintiffs argue that no report was submitted by "a customs officer, United States attorney, or any special attorney, having charge of any claim." Finally, plaintiffs contend that claims cannot be treated on a class-wide basis in a section 617 report, but rather such reports can only focus on the claims against individual importers.

The court disagrees with each of plaintiffs' three contentions. First, *a* report does exist which was prepared by a customs officer and which contains all three section 617 criteria, that being the memorandum dated February 19, 1980 of Robert E. Chasen, the Commissioner of Customs. That memorandum relates the following: (1) the background facts of the claims (the imports and parties involved, and the basis for computing antidumping duties); (2) the difficulties encountered in attempting to collect the antidumping duties and the weaknesses of the Government's case; and (3) a recommendation to settle the cases in the range of $50 million to $100 million.

A second report which satisfies the procedural requirements of section 617 is the memorandum of Homer E. Moyer, Jr., General Counsel of the Department of Commerce, dated April 28, 1980, addressed to the Secretary. The court does not see any fair grounds for disputing that his memorandum meets all three criteria of a section 617 report. The only real dispute is whether his memorandum can serve a dual purpose, namely, that of being both a section 617 report and the recommendation of the General Counsel.

Plaintiffs argue that it cannot, that section 617 requires the participation of three distinct individuals. However, there is nothing in section 617 proscribing this dual-purpose use of the General Counsel's memorandum. Taken to its logical extreme, plaintiffs' argument leads to the incongruous result that although one of Mr. Moyer's subordinates could serve as a section 617 "special attorney," and could prepare a section 617 report under the supervision of Mr. Moyer, Mr. Moyer himself could not do so. "No rule of construction necessitates . . . acceptance of an interpretation resulting in patently absurd consequences." *United States* v. *Brown*, 333 U.S. 18, 27, 68 S.Ct. 376, 380, 92 L.Ed. 442 (1948). *Accord United States* v. *Bryan*, 339 U.S. 323, 338, 70 S.Ct. 724, 734, 94 L.Ed. 884 (1950).

Regarding plaintiffs' second contention that no report was prepared by "a customs officer, United States attorney, or special attorney, having charge of any claim", Mr. Chasen, in his capacity as the Commissioner of Customs, was *the* customs officer who had charge of these claims. The fact that responsibility for the administration of the antidumping laws was transferred from the Treasury to the Commerce Department does not derogate from the role of the Customs Service under section 617. For under the Trade Agreements Act of 1979 the Customs Service still classifies and ultimately liquidates entries of merchandise subject to an antidumping duty order.

Finally, class-wide treatment of the antidumping duty claims, rather than the individual importer approach which plaintiffs propose, was permissible.[4] All of the claims settled in this case were the subject of the same antidumping duty finding, T.D. 71-76. All of the claims involved across-the-board application of the Japanese Commodity Tax to determine foreign market value and other uniform adjustments to that foreign market value. Thus, the "claim" involved here for purposes of section 617 involved the total claim for dumping duties imposed during the relevant period upon the importation of television receivers subject to T.D. 71-76 and the application of the various uniform principles developed by the Government in the course of imposing the duties upon those importations. The common threads running through these claims which made them suitable for group treatment in the antidumping duty proceeding are no less relevant in the context of a section 617 report. Indeed, these common fact elements, particularly the use of the Japanese Commodity Tax, are the very factors which led the officials who prepared section 617 reports to conclude that the Government's chances for recovery were

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[4] The term "any claim" in section 617 clearly may include one or more claims. 1 U.S.C. § 1 provides:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things: . . .

seriously impaired. Comprehensive treatment of all the claims in one report was thus appropriate.

Plaintiffs' attack on the sufficiency of Mr. Chasen's memorandum as to its detail and specificity goes to the substance of that memorandum. This line of inquiry is foreclosed by *Montgomery Ward*. *Id.* at 1262.

Lastly, on the question of whether a section 617 report was prepared, the court considers relevant the various letters and memoranda prepared by high ranking Government officials responsible for the administration of the customs laws.[5] All these letters and memoranda addressed at least some, if not all, of the three section 617 criteria. Some incorporate by reference the other letters and memoranda, the former supplementing the latter. Collectively those various letters and memoranda meet the requirements of a section 617 report. All these documents discuss at least some of the facts which gave rise to the claims. Most of the documents discuss the difficulties that the United States would encounter in defending the validity of the principles which it applied in imposing the antidumping duties. Finally, some of the documents contain the views of the authors as to the terms of an acceptable settlement. What is clear is that these letters and memoranda collectively meet the requirements of section 617.

In the last analysis, a literal reading of a statute should be avoided when doing so results in violence to or a subversion of the congressional purpose for the particular statutory scheme. Discovering and then carrying out that purpose is the paramount duty of every court faced with the task of interpreting a

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[5] These individuals were Commissioner of Customs Chasen; Lynn J. Barden, Assistant General Counsel for Import Administration; General Counsel Moyer; David M. Cohen, Director, Commercial Litigation Branch, Department of Justice; John Greenwald, Deputy Assistant Secretary for Import Administration; and Leonard Shambon, Designate-Director, Office of Compliance, U.S. Department of Commerce.

statute. For "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945).

Plaintiffs' argument that a single report must be prepared ignores the ultimate purpose of a section 617 report, namely, to ensure that the Secretary of Commerce makes an informed decision when contemplating a settlement. The court fails to see how the Secretary could have been better informed than in a situation where he is presented with reports from appointed officials within high echelons of the Government. Given this consideration, the various letters and memoranda prepared in contemplation of a section 617 settlement, either severally or collectively, satisfy the procedural requirements of section 617.

In sum, the court sees little, if any, likelihood of plaintiffs prevailing on the merits of Court II of their amended complaint.

B

In Count III of their amended complaint plaintiffs allege certain irregularities in the General Counsel's settlement recommendation to the Secretary. Plaintiffs do not contest that a section 617 recommendation was in fact prepared by the General Counsel. Rather, plaintiffs invite the court to review the contents of the General Counsel's memorandum which they maintain are materially defective and inaccurate, particularly as to the figure representing estimated antidumping duties.

This is an invitation which the court must decline, for plaintiffs' attack clearly goes to the merits and substance of the General Counsel's recommendation. The CCPA in *Montgomery Ward* instructed that judicial inquiry must cease once it is determined that the General Counsel recommended settle-

ment to the Secretary. As the court stated, 673 F.2d at 1263-64:

> [I]n *Morgan IV* [*Morgan* v. *United States*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941)] the Court clearly rejected the argument that probing into reasoning or motivation was appropriate as part of a procedural inquiry.
>
> These same principles must be applied in this case. At most, Zenith may press inquiry into whether the statutory procedural requirements for settlement were satisfied . . . . Proving that the estimate in the report to him [the Secretary] was lower than what Zenith considers reasonable does not destroy the lawfulness of his decision.

For this reason, the court concludes that there is little, if any, likelihood of success on the merits of Count III of plaintiffs' amended complaint.

C

We next turn to Count IV of plaintiffs' amended complaint. The thrust of that count is that the Secretary's decision to settle was not based on the section 617 report or the General Counsel's recommendation. It is uncontested, however, that all of the reports prepared in this case were done so in advance of the Secretary's settlement announcement of April 28, 1980. Moreover, it appears from the record that the General Counsel's recommendation, which referred to and incorporated those reports, was prepared and presented to the Secretary prior to his settlement announcement. With these facts the strong presumption of administrative regularity must apply here. *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C.Cir.1978). Allegations of impropriety or irregularity are highly speculative at best.

Further, the CCPA cautioned in *Montgomery Ward* that it is not "the function of the court to probe the mental processes of the Secretary." *Id.* at 1263 (quoting from the Supreme Court's *Morgan IV* opinion). Probing into reasoning or motivation is inappropriate as part of a procedural inquiry. *Id.* Thus, plain-

tiffs "may not . . . inquire into the Secretary's mental processes in deciding upon settlement in the guise of a challenge to procedure." *Id.* at 1264. But this is in effect what plaintiffs seek to do.

It appears, therefore, extremely unlikely that plaintiffs will succeed on the merits of Count IV of their amended complaint.

**D**

Finally, we consider Count V of plaintiffs' amended complaint. There, plaintiffs allege bad faith compliance with the procedures of section 617. An examination of that count reveals in essence an attack on the motives for the settlement agreement. As previously noted, inquiry into such motives are beyond this court's jurisdiction. *Montgomery Ward*, 673 F.2d at 1262-63. Success on the merits of Count V is, accordingly, highly unlikely.

**Conclusion**

Having concluded that there is little if any, likelihood of success on the merits of plaintiffs' amended complaint, plaintiffs' motion for a preliminary injunction is denied.

**Slip Op. 82-101**

UNITED STATES COURT OF INTERNATIONAL TRADE

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**Court No. 81-3-00258**

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COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

*Plaintiffs,*

v.

UNITED STATES,

*Defendant.*

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**ORDER**

Upon consideration of plaintiffs' motion for consolidation of hearing on preliminary injunction with trial on the merits, defendant's response thereto, and all other papers and proceedings, it is hereby ordered:

1. That the hearing on plaintiffs' motion for a preliminary injunction is consolidated with the trial on the merits of the amended complaint;

2. That judgment is granted in favor of the defendant on Counts I, II, III, IV and V of the amended complaint; and

3. That this action is dismissed.

/s/ Herbert N. Maletz
HERBERT N. MALETZ, Judge

November 15, 1982

# APPENDIX B

## EXCERPTS FROM THE AMENDED COMPLAINT FILED BY PETITIONERS IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

### COUNT I

74. The allegations of paragraphs 1 through 73 are hereby incorporated by reference.

75. Section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976), does not provide authority for officials of the defendant to compromise the assessment of antidumping duties mandated by section 202(a) of the 1921 Act and section 731 of the Antidumping Act nor does it authorize such officials to circumvent the procedures set forth in section 751 of the Antidumping Act relating to the review and determination of antidumping duties. The subject settlement constitutes an unlawful attempt by officials of the United States Government: (a) to deprive the plaintiffs of the opportunity to be heard before substantive determinations involving the amounts of antidumping duties to be assessed on merchandise subject to an existent dumping finding were made; (b) to deprive the plaintiffs of the right of judicial review over final determinations of antidumping duty assessments; and (c) to oust this Court of jurisdiction to review such determinations, which opportunity to be heard, which right to judicial review, and which jurisdiction were clearly conferred by Congress in the Trade Agreements Act of 1979. The action of officials of the United States, including officials at the Commerce Department, the Treasury Department and the Justice Department, in entering into settlement agreements with importers of television receivers from Japan subject to T.D. 71-76 were *ultra vires*, illegal and void.

### COUNT II

76. The allegations of paragraphs 1 through 73 and are hereby incorporated by reference.

77. The approval and execution of the April 28, 1980 settlement agreements respecting antidumping duties were procedurally defective in that the Secretary of Commerce failed to comply with the requirements imposed by section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976). Section 617 mandates that the Secretary's decision to settle be made upon a report of "a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised." *Id.* Further, the Secretary may decide to compromise only "if such action shall be recommended by the General Counsel." *Id.* The procedures mandated by section 617 were not satisfied in that no report of a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the Customs laws showing the facts upon which such claim is based, the probabilities of recovery and the terms upon which the same may be compromised was prepared in connection with the Secretary of Commerce's alleged approval of the April 28, 1980 settlement agreements.

## COUNT III

78. The allegations of paragraphs 1 through 73 are hereby incorporated by reference.

79. The Secretary of Commerce's decision to compromise alleged claims for antidumping duties was procedurally defective in that the General Counsel's recommendation to the Secretary failed to satisfy the requirements of section 617 of the Tariff act of 1930, as amended, 19 U.S.C. § 1617 (1976). Section 617 authorizes the Secretary to compromise only after receiving a recommendation of the General Counsel. The purpose underlying this requirement is to provide the Secretary with an unbiased opinion by his chief legal adviser respecting the legal basis for the settlement outlined in the special report and a recommendation with respect to the Secretary's decision to settle. The recommendation of the General Counsel contained

statements and opinions of law and fact that were false, misleading, and not supported by the record upon which the Secretary's decision was required to be based. In addition, the General Counsel's recommendation failed to recount or to evaluate all of the material terms of the proposed settlement. The General Counsel's recommendation contained the following deficiencies, among others:

A. The General Counsel's recommendation incorrectly advised the Secretary that it was the statutory responsibility of the General Counsel rather than the Secretary to review the report prepared by the attorney having charge of the claims to be compromised. Section 617 authorizes the Secretary to compromise "[u]pon a report by a customs officer, United States Attorney, or any special attorney having charge of any claim . . . ." The General Counsel's erroneous advice that it was his, rather than the Secretary's, ultimate responsibility to review the special report creates so many uncertainties with respect to whether and under what circumstances the Secretary reviewed a report of an attorney having charge of the claims to be compromised so as to preclude this Court from finding that the Secretary properly discharged whatever responsibilities he may have had under section 617.

B. The General Counsel's report asserted that the Department of Commerce "made its most informed estimate" that the maximum amount of antidumping duties that could be claimed was $138.7 million. In fact, this so-called "informed estimate" was not prepared by officials at the Department of Commerce as required by section 617, but rather was prepared by the Assistant General Counsel of the USTR on the basis of information manipulated by him on a computer maintained by the USTR. The Assistant General Counsel of the USTR was not a "customs officer, United States attorney or any special attorney having charge of any claim" within the meaning of 19 U.S.C. § 1617 (1976), nor was he an employee responsible to the Secretary of Commerce;

C. The General Counsel's recommendation falsely stated that the *maximum* amount of antidumping duties that could be collected under theories *most* favorable to the defendant was $138.7 million. In fact, the $138.7 mil-

lion projection generated by the USTR represented a number closer to the *minimum, not the maximum,* amount of duties reflected on the computer projections made at the time and was based upon legal theories and factual findings *least* favorable to the government;

D. The General Counsel's recommendation advised the Secretary that even the $138.7 million could be lowered during the protest review process. This statement was highly misleading because the estimation of the $138.7 million figure was already predicated upon the granting of significant claims for downward adjustments in antidumping duties and because it failed to advise the Secretary that the $138.7 million was subject to increase in the event that domestic interests successfully challenged the defendant's antidumping duty determinations in court.

E. The General Counsel recommended settlement because the use of the Japanese Commodity Tax methodology in ascertaining foreign market value involved a "very substantial litigation risk." The General Counsel failed to point out that use of the Japanese Commodity Tax methodology accounted for only a small portion of the actual duty liability of importers. The great bulk of importers' liability turned on routine legal questions regarding circumstances of sale adjustments and the like—issues raised and decided in virtually all antidumping duty determinations. In reality, the government could abandon the perceived legal risk of the Japanese Commodity Tax methodology without significantly lowering the dumping duty exposure of importers. References to litigation risks surrounding the Japanese Commodity Tax methodology were highly misleading.

F. The General Counsel's memorandum to the Secretary failed to disclose all of the material terms of the settlement agreements:

(i) No mention was made of the fact that the agreements were structured in such a way as to preclude the Commerce Department from enforcing the terms of 19 C.F.R. 353.55 (1980), which was designed to prevent importers from benefiting from any reimbursement of antidumping duties by foreign producers.

(ii) No mention was made of the commitment (set forth in paragraph 6(h) of the specimen agreement) that the United States would thereafter use the traditional methodology, that is the methodology employed prior to March 31, 1978 and specifically not the Japanese Commodity Tax methodology, for ascertaining unadjusted foreign market value, in calculating foreign market values, purchase prices and expoters' sales prices. The Secretary was not informed that such a commitment could not be reconciled with the obligations imposed under section 739 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673h (Supp. III 1979) to use all reasonable ways and means to ascertain and determine or to estimate foreign market value or United States price.

(iii) No mention was made nor explanation given of the commitment (set forth in paragraph 6(j) of the specimen agreement) that the United States shall promptly revoke or modify T.D. 71-76 as soon as circumstances warrant such revocation or modification.

The General Counsel's recommendation to the Secretary was so materially deficient that the Secretary could not have properly exercised whatever statutory authority he may have had under section 617. The purpose of the General Counsel's formal recommendation is to provide the Secretary with a proper legal and factual framework within which the Secretary's deliberative process could function so as to render an appropriate decision under section 617. The deficiencies in the General Counsel's recommendation were so material to the decisionmaking process that the recommendation could not be deemed to have satisfied the requirements of section 617 and the Secretary could not have made any appropriate substantive judgments with respect to the compromise of claims on the basis of that recommendation.

## COUNT IV

80. The allegations of paragraphs 1 through 79 are hereby incorporated by reference.

81. The Secretary of Commerce failed to satisfy the procedures of section 617 in deciding to compromise alleged claims for antidumping duties arising out of T.D. 71-76. Section 617 authorizes the Secretary to compromise a claim upon receipt of a report of an officer or attorney in charge of the claims and upon the recommendation of the General Counsel. The purpose of these requirements is to provide the Secretary with sufficient and timely information supported by a recommendation of his chief legal adviser upon which to base his decision on whether to compromise. The Secretary of Commerce failed to make the reasoned and considered judgment to compromise required by section 617. At least several days prior to the execution of the April 28, 1980 settlement agreements, the Secretary had already decided to effect a compromise of alleged claims for antidumping duties under T.D. 71-76 and so informed the President of the United States by written memorandum. This decision to compromise was made without the benefit of a report by a customs attorney, United States attorney, or special attorney having charge of a claim arising under the Customs laws. This departure from the procedures mandated by section 617 was never remedied. No report of an officer or attorney in charge of the claim showing the facts of the claim, the probabilities of recovery or the terms of compromise was prepared for or submitted to the Secretary for his consideration. The General Counsel's recommendation was not prepared until 2:30 a.m. on April 28, 1980 and was not made available for the Secretary, if at all, until after the opening of business on April 28, 1980. The administrative record prepared by the defendant does not reflect whether the Secretary actually received and read the General Counsel's recommendation, nor does the record reflect whether the Secretary received and read any of the documents erroneously alleged by defendant to satisfy the requirement of section 617 that the Secretary's compromise decision be based upon the special report of an officer or attorney having charge of the claim or claims to be compromised. The administrative record also fails to indicate whether the Secretary ever personally approved the proposed settlements. Moreover, even if the Secretary

actually received the General Counsel's recommendation and a special report, comprehension of the facts of the case and justifications for compromise would be simply impossible in the time available, particularly regarding a case involving the magnitude and complexity of T.D. 71-76. The procedures of section 617 could not have been and were not in fact satisfied by the Secretary of Commerce in his decision to compromise alleged claims for antidumping duties arising out of T.D. 71-76. The subject settlement agreements accordingly are unlawful and void.

COUNT V

82. The allegations of paragraphs 1 through 81 are hereby incorporated by reference.

83. Assuming that section 617 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1617 (1976) provides general authority to compromise "claims" for antidumping duties (which authority plaintiffs deny), the exercise of that authority with respect to the liability of importers for antidumping duties by the defendant was undertaken in bad faith and in conscious disregard for the procedures mandated by section 617 for the proper compromise of claims. The manifestations of bad faith underlying the defendant's attempted exercise of compromise authority were due in a large part to the fact that the recommendation to enter into settlement agreements was the result of extreme political pressure exerted by the Government of Japan upon the Government of the United States. The settlement agreements were not grounded upon considerations which Congress deemed appropriate for the compromise of claims under section 617; *i.e.*, the existence of specific claims ripe for compromise because the relevant facts had been investigated and ascertained, the probabilities of recovery determined and the terms upon which the claims could be compromised negotiated with importers. At the time of the April 28, 1980 settlement agreements were executed, defendant had gathered only fragmentary information with respect to a limited number of models imported on or before June 30, 1973. All

the other information with respect to television receivers imported prior to April 1, 1977 had been rejected as being incomplete, unreliable, and/or false and little or no information with respect to models imported between April 1, 1977 and March 31, 1979 had ever been obtained. The factual predicate for the compromise of claims for antidumping duties on entries of television receivers through March 31, 1979 was simply nonexistent.

84. In recommending the execution of the April 28, 1980 settlement agreements, the General Counsel erroneously advised the Secretary that the Commerce Department had made its most informed estimate of the maximum amount of antidumping duties that could be collected on entries of television receivers made between March 1, 1973 and March 31, 1979. The estimate was not in fact made by the Commerce Department but rather by the Assistant General Counsel of the Office of the United States Trade Representative. Furthermore, neither the General Counsel's recommendation nor any document offered by the defendant in satisfaction of the requirement of section 617 for a special report disclosed the factual predicate for the so-called informed estimate. This so-called informed estimate was based upon an attempt to project duties for all monochrome and color television receivers imported over the seven year period ending on March 31, 1979 on the basis of protest review decisions the disposition of which was based upon data covering only three export models of television receivers per manufacturer entered for consumption prior to June 30, 1973. Officials of the defendant failed to inform the Secretary that use of this methodology to project actual antidumping duties was specifically rejected by the Commissioner of Customs in March of 1979.

85. There is no rational basis for attempting to project antidumping duties using the methodology employed by the defendant because that methodology assumed, contrary to fact, that the three television receivers per manufacturer entered for consumption prior to June 30, 1973 were representative of all screen sizes and models of all color and monochrome

television receivers entered during the later period. This methodology also assumed, contrary to fact, that the pre-June 30, 1973 pricing decisions and marketing strategy of Japanese manufacturers was typical of the pricing decisions and marketing strategy of Japanese manufacturers in both their home market and the United States market during the later period. Between 1973 and 1976 imports of color television receivers from Japan increased five-fold and Japanese color television receivers went 12.4 to 29.5 percent of apparent domestic (U.S.) consumption. In view of the aggressive commercial behavior of Japanese manufacturers subsequent to 1973, the assumptions upon which the defendant's projections were manifestly incorrect.

86. In addition to an inadequate data base for making this projection, the antidumping duties determined during the protest review decisions respecting pre-June 30, 1973 imports grossly understated the true margins of dumping on even those few entries. Those decisions reflect arbitrary allowances based upon Japanese manufacturers' unjustified claims for adjustments to foreign market value. The granting of claims for adjustments resulted in the reduction of antidumping duties by hundreds of millions of dollars. The granting of these claims was made notwithstanding the following: (a) the Customs Service had previously made numerous efforts to verify said claims (including numerous visits by Customs Service attorneys and auditors to the facilities of the television receiver manufacturers in Japan) and had repeatedly rejected the claims as being unreliable and unsubstantiated; (b) numerous Customs Service attorneys and the Customs Services' auditor had previously recommended against the allowance of said claims; (c) private auditors retained by the government for the purpose of giving advice with respect to the adjustment claims of a leading Japanese television manufacturer had previously recommended to the Customs Service that the claims were not supported by the available data; and (d) numerous Customs Service attorneys had correctly recommended against the allowance of some of the claims as a matter of law.

87. The General Counsel's recommendation to the Secretary informed the Secretary that the $138.7 million projection of antidumping duties was based upon "most favorable theories" and "a view of the legal issue[s] favorable to the Government." This representation, which had to have gone to the core of any compromise decision by the Secretary, was false. The defendant's projections of antidumping duties was based upon the protest review decisions which officials of the defendant knew did not embody theories favorable to the United States. One of the many important issues decided in the protest review decisions which reduced potential dumping margins by many millions of dollars concerned the exporters' sales price offset (ESP Offset) described in paragraphs 42-47, *supra*. The allowance of the ESP Offset as an adjustment to foreign market value was definitely not the resolution of an issue under a theory most favorable to the United States. The reduction of the $46 million assessed on March 31, 1978 to only $8 million after the protest review decisions involved the resolution of many, if not most, legal and factual issues in favor of importing interests.

88. The need to reduce the potential claims for antidumping duties during the protest review decisions so as to establish a basis for settlement required that virtually all legal and factual issues be resolved favorably to importing interests and in such a way that domestic interests would not be able to challenge such decisions. Under the transition rules of the Trade Agreements Act of 1979, protests from all entries liquidated prior to January 1, 1980 would be disposed of under the procedures of prior law. Trade Agreements Act of 1979, Title X, Section 1002, 93 Stat. 306. Thus, the protest review decisions were being administered under the provisions of 19 U.S.C. § 1514-15 (1976) and were relatively immune from challenge by domestic interests. The rights of domestic interests to challenge antidumping duty assessments were controlled by 19 U.S.C. § 1516 (1976). Domestic interests had no right to participate in administrative protests filed by importers. If domestic producers wished to challenge an antidumping duty assessment under the old law, they were relegated to bringing

test cases whose impact (if successful) was prospective only. *See* 19 U.S.C. § 1516(e), (g) (1976). Once the Trade Agreements Act of 1979 was enacted, there was no real point in bringing a section 516 case because antidumping duties on future entries would be determined under section 751(a) of the new law. Under these circumstances, the disposition of importer's administrative protests from the March 31, 1978 liquidations were relatively immune from attack by domestic interests. Officials of the defendant were thus in a position to artificially reduce the duties to be finally assessed on the previouly liquidated entries and use those unusually low duty calculations to "project" future duties as the basis for a settlement. Those officials of the defendant who were responsible for placing the compromise option before the Secretary knew that if such a settlement could be accomplished without making a determination under section 751(a) of the new law, the whole matter could be disposed of without challenge by domestic interests. The recommendation of the General Counsel was obviously intended to convince the Secretary that the proposed settlement involved a balanced and reasonable approach and was based upon theories of law which tended to exaggerate the maximum amount of duties owed. Such representations were false and served to undermine the proper utilization of section 617.

89. The Secretary was not informed that the full understanding reached between the Government of Japan and the United States Government was not completely set forth in the settlement agreements, but that additional agreements and undertakings had been reached which were inconsistent with the Secretary's enforcement responsibilities under the law. Those additional agreements and understandings included commitments to:

(a) conduct verification in a manner prearranged with Japanese manufacturers and designed to achieve a predetermined result, *i.e.*, positive verification of data allegedly supporting claims which understated unadjusted foreign market value and inflated claims for downward adjustment of foreign market value;

(b) permit reimbursement by Japanese manufacturers of payments by importers in satisfaction of the settlement agreements, in direct variance with Customs Service and Commerce Department regulations which require that importers be denied the benefits of reimbursement; and

(c) revoke T.D. 71-76 as soon as possible.

Under these circumstances, the Secretary could not possibly evaluate the terms of compromise as required by section 617.

90. Neither the Treasury Department officials who negotiated the aborted settlement effort of 1978 the terms of which served as the basis for the 1980 settlement, nor the officials of the Office of the United States Trade Representative and the Department of Commerce who continued those earlier efforts and negotiated and/or approved the April 28, 1980 agreements, considered or evaluated the implications of those agreements on the injured domestic television industry and its workers. The decision to abandon the statutory mandate calling for the assessment and collection of antidumping duties and to use the compromise authority set forth in section 617 without considering the implications of this action on the intended beneficiaries of the antidumping law represents complete abdication of the defendant's responsibilities under both of these laws.

# TABLE OF STATUTES

RIGHTS OF REVIEW



REPEAL OF PRIOR LAW



TRANSITION RULES



JURISDICTIONAL AUTHORITY

**Section 617 of the Tariff Act of 1930, as amended (19 U.S.C. § 1617 (1976)):**

> **Compromise of Government claims by Secretary of Treasury**
>
> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

**Section 201(c) of the Antidumping Act of 1921, as amended (19 U.S.C. § 160(c) (1976)):**

> **Information to Secretary of the Treasury alleging that foreign merchandise is being sold or is likely to be sold at less than fair value; determination of whether to initiate investigation; publication; substantial doubt**
>
> (1) The Secretary shall, within thirty days of the receipt of information alleging that a particular class or kind of merchandise is being or is likely to be sold in the United States or elsewhere at less than its fair value and that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, determine whether to initiate an investigation into the question of whether such merchandise in fact is being or is likely to be sold in the United States or elsewhere at less than its fair value. If his determination is affirmative he shall publish notice of the initiation of such an investigation in the Federal Register. If it is negative, the inquiry shall be closed.
>
> (2) If, in the course of making a determination under paragraph (1), the Secretary concludes, from the information available to him, that there is substantial doubt whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason by the importation of such merchandise into the United States, he shall forward to the Commis-

sion the reasons for such substantial doubt and a preliminary indication, based upon whatever price information is available, concerning possible sales at less than fair value, including possible margins of dumping and the volume of trade. If within thirty days after receipt of such information from the Secretary, the Commission, after conducting such inquiry as it deems appropriate, determines there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, it shall advise the Secretary of its determination and any investigation under subsection (b) of this section then in progress shall be terminated.

**Section 202(a) of the Antidumping Act of 1921, as amended (19 U.S.C. § 161(a) (1976)):**

**Amount of duty to be collected**

**(a) Levy, collection and payment of additional duty**

In the case of all imported merchandise, whether dutiable or free of duty, of a class or kind as to which the Secretary of the Treasury has made public a finding as provided for in section 160 of this title, entered, or withdrawn from warehouse, for consumption, not more than one hundred and twenty days before the question of dumping was raised by or presented to the Secretary or any person to whom authority under said section has been delegated, and as to which no appraisement has been made before such finding has been so made public, if the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the constructed value) there shall be levied, collected, and paid, in addition to any other duties imposed thereon by law, a special dumping duty in an amount equal to such difference.

**Section 203 of the Antidumping Act of 1921, as amended (19 U.S.C. § 162 (1976)):**

> **Price at which merchandise has been purchased or agreed to be purchased prior to time of exportation; other additions and subtractions in determination**
>
> For the purposes of sections 160 to 171 of this title, the purchase price of imported merchandise shall be the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and less the amount, if included in such price, of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country or exportation; and plus the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, which rebate or noncollection has been determined by the Secretary to be a bounty or grant within the meaning of section 1303 of this title.

**Section 204 of the Antidumping Act of 1921, as amended (19 U.S.C. § 163 (1976)):**

**Price at which merchandise is sold or agreed to be sold in United States; other additions and substractions in determination**

For the purposes of sections 160 to 171 of this title, the exporter's sale price of imported merchandise shall be the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, less (1) the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States, (2) the amount of the commissions, if any, for selling in the United States the particular merchandise under consideration, (3) an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, (4) the amount of any export tax imposed by the country of exportation on the exportation of the merchandise to the United States, and (5) the amount of any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise within the meaning of section 166 of this title; and plus the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States; and plus the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise

when sold in the country of exportation; and plus the amount of any taxes rebated, or not collected, by reason of the exportation of the merchandise to the United States, which rebate or noncollection has been determined by the Secretary to be a bounty or grant within the meaning of section 1303 of this title.

**Section 731 of the Tariff Act of 1930, as amended (19 U.S.C. § 1673 (Supp. III 1979)):**

**Imposition of antidumping duties**

If—

(1) the adminstering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise.

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

**Section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(a) (Supp. III 1979)):**

**Periodic review of amount of duty**

**(1) In general**

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of

the suspension of an investigation, the administering authority, after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

**(2) Determination of antidumping duties**

For the purpose of paragraph (1)(B), the administering authority shall determine—

(A) the foreign market value and United States price of each entry of merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

**Section 751(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1675(d) (Supp. III 1979)):**

**Hearings**

Whenever the administering authority or the Commission conducts a review under this section it shall, upon the

request of any interested party, hold a hearing in accordance with section 1677c(b) of this title in connection with that review.

**Section 772 of the Tariff Act of 1930, as amended (19 U.S.C. § 1677a (Supp. III 1979)):**

**United States price**

**(a) United States price**

For purposes of this subtitle, the term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

**(b) Purchase price**

For purposes of this section, the term "purchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

**(c) Exporter's sales price**

For purposes of this section, the term "exporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

**(d) Adjustments to purchase price and exporter's sales price**

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States;

(B) the amount of any import duties imposed by the country of exportation which have been rebated, or

which have not been collected, by reason of the exportation of the merchandise to the United States;

(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation; and

(D) the amount of any countervailing duty imposed on the merchandise under part I of this subtitle or section 1303 of this title to offset an export subsidy, and

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and

(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.

**(e) Additional adjustments to exporter's sales price**

For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—

(1) commissions for selling in the United States the particular merchandise under consideration,

(2) expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise, and

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

**Section 773 of the Tariff Act of 1930, as amended (19 U.S.C. § 1677b (Supp. III 1979)):**

**Foreign market value**

**(a) Determination; fictitious market; sales agencies**

For purposes of this subtitle—

**(1) In general**

The foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States—

(A) at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption, or

(B) if not so sold or offered for sale for home consumption, or if the administering authority determines that the quantity sold for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so sold or offered for sale for exportation to countries other than the United States,

increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchased or agreed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such purchase or agreement to purchase. In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

**(2) Use of constructed value**

If the administering authority determines that the foreign market value of imported merchandise cannot be determined under paragraph (1)(A), then, notwithstanding paragraph (1)(B), the foreign market value of the merchandise may be the constructed value of that mer-

chandise, as determined under subsection (e) of this section.

**(3) Indirect sales and offers for sale**

If such or similar merchandise is sold or, in the absence of sales, offered for sale through a sales agency or other organization related to the seller in any of the respects described in section 1677(13) of this title, the prices at which such or similar merchandise is sold or, in the absence of sales, offered for sale by such sales agency or other organization may be used in determining the foreign market value.

**(4) Other adjustments**

In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—

(A) the fact that the wholesale quantities, in which such or similar merchandise is sold or, in the absence of sales, offered for sale, for exportation to, or in the principal markets of, the United States, as appropriate, in the ordinary course of trade, are less or are greater than the wholesale quantities in which such or similar merchandise is sold or, in the absence of sales, offered for sale, in the principal markets of the country of exportation in the ordinary course of trade for home consumption (or, if not so sold for home consumption, then for exportation to countries other than the United States);

(B) other differences in circumstance of sale; or

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value.

then due allowance shall be made therefor.

**(b) Sales at less than cost of production**

Whenever the administering authority has reasonable grounds to believe or suspect that sales in the home market of the country of exportation, or, as appropriate, to

countries other than the United States, have been made at prices which represent less than the cost of producing the merchandise in question, it shall determine whether, in fact, such sales were made at less than the cost of producing the merchandise. If the administering authority determines that sales made at less than cost of production—

(1) have been made over an extended period of time and in substantial quantities, and

(2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade,

such sales shall be disregarded in the determination of foreign market value. Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

**(c) State-controlled economies**

If available information indicates to the administering authority that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a) of this section, the administering authority shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses, and profits as reflected by either—

(1) the prices, determined in accordance with subsection (a) of this section, at which such or similar merchandise of a non-State-controlled-economy country or countries is sold either—

(A) for consumption in the home market of that country or countries, or

(B) to other countries, including the United States; or

(2) the constructed value of such or similar merchandise in a non-State-controlled-economy country or countries as determined under subsection (e) of this section.

**(d) Special rule for certain multinational corporations**

Whenever, in the course of an investigation under this subtitle, the administering authority determines that—

(1) merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries;

(2) the sales of such or similar merchandise by the company concerned in the home market of the exporting country are nonexistent or inadequate as a basis for comparison with the sales of the merchandise to the United States; and

(3) the foreign market value of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation,

it shall determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation. The administering authority, in making any determination under this paragraph, shall make adjustments for the difference between the costs of production (including taxes, labor, materials, and overhead) of such or similar merchandise produced in facilities outside the country of exportation and costs of production of such or similar merchandise produced in the facilities in the country of exportation, if such differences are demonstrated to its satisfaction. For the purposes of this subsection, in determining foreign market value of such or similar merchandise produced in a country outside of the country of exportation, the administering authority shall determine

its price at the time of exportation from the country of exportation and shall make any adjustments required by subsection (a) of this section for the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States by reference to such costs in the country of exportation.

**(e) Constructed value**

**(1) Determination**

For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—

(A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of the particular merchandise in the ordinary course of business;

(B) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, except that—

(i) the amount for general expenses shall not be less than 10 percent of the cost as defined in subparagraph (A), and

(ii) the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost; and

(C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise under consideration in condition, packed ready for shipment to the United States.

**(2) Transactions disregarded; best evidence**

For the purposes of this subsection, a transaction directly or indirectly between persons specified in any one of the subparagraphs in paragraph (3) of this subsection may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available as to what the amount would have been if the transaction had occurred between persons not specified in any one of the subparagraphs in paragraph (3) of this section.

**(3) Related parties**

The persons referred to in paragraph (2) of this subsection are:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officers or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

**(f) Authority to use sampling techniques and to disregard insignificant adjustments**

For the purpose of determining foreign market value under this section, the administering authority may—

(1) use averaging or generally recognized sampling techniques whenever a significant volume of sales is

involved or a significant number of adjustments to prices is required, and

(2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.

**Section 777(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677f(c)(1) (Supp. III 1979)):**

**Limited disclosure of certain confidential information under protective order**

**(1) Disclosure by administering authority or commission**

**(A) In general**

Upon receipt of an application, which describes with particularity the information requested and sets forth the reasons for the request, the administering authority and the Commission may make confidential information submitted by any other party to the investigation available under a protective order described in subparagraph (B).

**(B) Protective order**

The protective order under which information is made available shall contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall provide by regulation for such sanctions as the administering authority and the Commission determine to be appropriate, including disbarment from practice before the agency.

**Section 516 of the Tariff Act of 1930, as amended (19 U.S.C. § 1516 (1976)):**

**Petitions by American manufacturers, producers, or wholesalers**

**(a) Classification, rate of duty, countervailing duty, and antidumping of duty furnished upon request; petition; contents**

The Secretary shall, upon written request by an American manufacturer, producer, or wholesaler, furnish the

classification, the rate of duty, the additional duty described in section 1303 of this title (hereinafter in this section referred to as "countervailing duties"), if any, and the special duty described in section 161 of this title (hereinafter in this section referred to as "antidumping duties"), if any, imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by him. If such manufacturer, producer, or wholesaler believes that the appraised value is too low, that the classification is not correct, that the proper rate of duty is not being assessed, or that countervailing duties or antidumping duties should be assessed, he may file a petition with the Secretary setting forth (1) a description of the merchandise, (2) the appraised value, the classification, or the rate or rates of duty that he believes proper and (3) the reasons for his belief including, in appropriate instances, the reasons for his belief that countervailing duties or antidumping duties should be assessed.

**(b) Determination of petition; notification to petitioner; procedures for countervailing duties and antidumping duties**

If, after receipt and consideration of a petition filed by an American manufacturer, producer, or wholesaler, the Secretary decides that the appraised value of the merchandise is too low, that the classification of the article or rate of duty assessed thereon is not correct, or that countervailing duties or anti-dumping duties should be assessed, he shall determine the proper appraised value or classification, rate of duty, or countervailing duties, or antidumping duties and shall notify the petitioner of his determination. Except for countervailing duty and antidumping duty purposes, all such merchandise entered for consumption or withdrawn from warehouse for consumption more than thirty days after the date such notice to the petitioner is published in the weekly Customs Bulletin shall be appraised or classified or assessed as to rate of duty in accordance with the Secretary's determination. For countervailing duty purposes, the procedures set forth in section 1303 of this title shall apply. For antidumping duty purposes, the procedures set forth in section 160 of this title shall apply.

**(c) Determination of correctness of initial appraised value, classification, rate of duty, or non-assessment of countervailing duties or antidumping duties; contest by petitioner; procedure**

If the Secretary decides that the appraised value or classification of the articles or the rate of duty with respect to which a petition was filed pursuant to subsection (a) of this section is correct, or that countervailing duties or antidumping duties should not be assessed, he shall so inform the petitioner. If dissatisfied with the decision of the Secretary, the petitioner may file with the Secretary, not later than thirty days after the date of the decision, notice that he desires to contest the appraised value or classification of, or rate of duty assessed upon or the failure to assess countervailing duties or antidumping duties upon, the merchandise. Upon receipt of notice from the petitioner, the Secretary shall cause publication to be made of his decision as to the proper appraised value or classification or rate of duty or that countervailing duties or antidumping duties should not be assessed and of the petitioner's desire to contest, and shall thereafter furnish the petitioner with such information as to the entries and consignees of such merchandise, entered after the publication of the decision of the Secretary at such ports of entry designated by the petitioner in his notice of desire to contest, as will enable the petitioner to contest the appraised value or classification of, or rate of duty imposed upon or failure assess countervailing duties or antidumping duties upon, such merchandise in the liquidation of one such entry at such port. The Secretary shall direct the appropriate Customs officer at such ports to notify the petitioner by mail immediately when the first of such entries is liquidated.

**(d) Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid**

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2)under section 1303 of this title that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

**(e) Appraisal, classification, and liquidation of entries of merchandise covered by published decisions of the Secretary**

Notwithstanding the filing of an action pursuant to section 2632 of title 28, merchandise of the character covered by the published decision of the Secretary (when entered for consumption or withdrawn from warehouse for consumption on or before the date of publication of a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, not in harmony with the published decision of the Secretary) shall be appraised or classified, or both, and the entries liquidated, in accordance with the decision of the Secretary and, except as otherwise provided in this chapter, the final liquidations of these entries shall be conclusive upon all parties.

**(f) Consignee or his agent as party in interest before the Customs Court**

The consignee or his agent shall have the right to appear and to be heard as a party in interest before the United States Customs Court.

**(g) Appraisement, classification, and assessment of duty of merchandise covered by published decision of the Secretary in accordance with final judicial decision of Customs Court or Court of Customs and Patent Appeals sustaining cause of action in whole or in part; suspension of liquidation of entries**

If the cause of action is sutained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals, merchandise of the character covered by the published decision of the Secretary, which is entered for consumption or withdrawn from warehouse for consumption after the date of publication of the court decision, shall be subject to appraisement, classification, and assessment of duty in accordance with the final judicial decision in the action, and the liquidation of entries covering the merchandise so entered or withdrawn shall be suspended until final disposition is made of the action, whereupon the entries shall be liquidated, or if necessary, reliquidated in accordance with the final decision.

**(h) Regulations implementing required procedures**

Regulations shall be prescribed by the Secretary to implement the procedures required under this section.

**Section 516A of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a (Supp. III 1979)):**

**Judicial review in countervailing duty and antidumping duty proceedings**

**(a) Review of determination**

**(1) Review of certain determinations**

Within 30 days after the date of publication in the Federal Register of notice of—

(A) a determination by the Secretary or the administering authority, under section 1303(a)(3), 1671a(c), or 1673a(c) of this title, not to initiate an investigation,

(B) a determination by the administering authority, under section 1671b(c) or 1673b(c) of this title, that a case is extraordinarily complicated,

(C) a determination by the administering authority or the Commission, under section 1675(b) of this title, not to review an agreement or a determination based upon changed circumstances,

(D) a negative determination by the Commission, under section 1671b(a) or 1673b(a) of this title, as to whether there is reasonable indication of material injury, threat of material injury, or material retardation, or

(E) a negative determination by the administering authority under section 1671b(b) or 1673b(b) of this title,

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Customs Court by filing concurrently a summons and complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

**(2) Review of determinations on record**

**(A) In general**

Within thirty days after the date of publication in the Federal Register of—

(i) notice of any determination described in clause (ii), (iii), (iv), or (v) of subparagraph (B), or

(ii) an antidumping or countervailing duty order based upon any determination described in clause (i) of subparagraph (B),

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Customs Court by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

**(B) Reviewable determinations**

The determinations which may be contested under subparagraph (A) are as follows:

(i) Final affirmative determinations by the Secretary and by the Commission under section 1303 of this title, or by the administering authority and by the Commission under section 1671d or 1673d of this title.

(ii) A final negative determination by the Secretary, the administering authority, or the Commission under section 1303, 1671d, or 1673d of this title.

(iii) A determination, other than a determination reviewable under paragraph (1), by the Secretary, the administering authority, or the Commission under section 1675 of this title.

(iv) A determination by the administering authority, under section 1671c or 1673c of this title, to suspend an antidumping duty or a countervailing duty investigation.

(v) An injurious effect determination by the Commission under section 1671c(h) or 1673c(h) of this title.

**(3) Procedures and fees**

The procedures and fees set forth in subsections (b), (c), and (e) of section 2632 of title 28 apply to an action under this section.

**(b) Standards of review**

**(1) Remedy**

The Court shall hold unlawful any determination, finding, or conclusion found—

(A) in an action brought under paragraph (1) of subsection (a) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or

(B) in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

**(2) Record for review**

**(A) In general**

For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

**(B) Confidential or privileged material**

The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

**(c) Liquidation of entries**

**(1) Liquidation in accordance with determination**

Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) of this section shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Customs Court, or of the United States Court of Customs and Patent Appeals, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

**(2) Injunctive relief**

In the case of a determination described in paragraph (2) of subsection (a) of this section by the Secretary, the administering authority, or the Commission, the United States Customs Court may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances. In ruling on a request for such injunctive relief, the court shall consider, among other factors, whether—

(A) the party filing the action is likely to prevail on the merits,

(B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,

(C) the public interest would best be served if liquidation is enjoined, and

(D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.

**(3) Remand for final disposition**

If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

**(d) Standing**

Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Customs Court. The party filing the action shall notify all interested parties of the filing of an action pursuant to this section.

**(e) Liquidation in accordance with final decision**

If the cause of action is sustained in whole or in part by a decision of the United States Customs Court or of the United States Court of Customs and Patent Appeals—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

**(f) Definitions**

For purposes of this section—

**(1) Administering authority**

The term "administering authority" means the administering authority described in section 1677(1) of this title.

**(2) Commission**

The term "Commission" means the United States International Trade Commission.

**(3) Interested party**

The term "interested party" means any person described in section 1677(9) of this title.

**(4) Secretary**

The term "Secretary" means the Secretary of the Treasury.

**Section 106(a) of the Trade Agreements Act of 1979 (Pub. L. No. 96-39, 93 Stat. 144, 193 (1979)):**

> REPEAL OF OLD LAW.—The Antidumping Act, 1921 (19 U.S.C. 160 et seq.) is hereby repealed but findings in effect on the effective date of this Act, or issued pursuant to court order in an action brought before that date, shall remain in effect, subject to review under section 751 of the Tariff Act of 1930.

**Section 1002(b)(3) of the Trade Agreements Act of 1979 (19 U.S.C. § 1516a note (Supp. III 1979)):**

> CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS.—The amendments made by this title [enacting this section and amending sections 1514, 1515, and 1516 of this title and sections 1541, 1582, 2632, 2633, and 2637 of Title 28, Judiciary and Judicial Procedure] shall apply with respect to the review of the assessment of, or failure to assess, any countervailing duty or antidumping duty on entries subject to a countervailing duty order or antidumping finding if the assessment is made after the effective date. If no assessment of such duty had been made before the effective date that could serve the party seeking review as the basis of a review of the underlying determination, made by the Secretary of the Treasury or the International Trade Commission before the effective date, on which such order, finding, or lack thereof is based, then the underlying determination shall be subject to review in accordance with the law in effect on the day before the effective date.

**28 U.S.C. § 1254(1) (1976):**

> **Courts of appeals; certiorari; appeal; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**Section 201 of the Customs Courts Act of 1980 (28 U.S.C. § 1581 (Supp. IV 1981)):**

> **Civil actions against the United States and agencies and officers thereof**
>
> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> (b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.
>
> (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.
>
> (d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—
>
> (1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;
>
> (2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and
>
> (3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.
>
> (e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.
>
> (f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

**Section 201 of the Customs Courts Act of 1980 (19 U.S.C. § 1585 (Supp. IV 1981)):**

**Powers in law and equity**

The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

No. 82-2045

# In the Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a/k/a COMPACT), ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Secretary of Commerce is authorized under 19 U.S.C. 1617 to compromise claims for dumping duties imposed upon imported television receivers.

2. Whether petitioners' allegations that the Secretary acted in bad faith in compromising claims for dumping duties is judicially reviewable.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 82-2045

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a/k/a COMPACT), ET AL., PETITIONERS

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 706 F.2d 1574. The opinion of the Court of International Trade (Pet. App. 10a-19a) denying petitioners' application for a preliminary injunction is reported at 551 F. Supp. 1142. The opinion of the Court of International Trade granting partial summary judgment in favor of the United States with respect to one count of the original complaint is reported at 527 F. Supp. 341.

### JURISDICTION

The judgment of the court of appeals was entered on May 2, 1983. The petition for a writ of certiorari was filed on June 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

Section 617 of the Tariff Act of 1930, 19 U.S.C. 1617, provides:

> Upon a report by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury [1] is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

## STATEMENT

1. Petitioners are associations of manufacturers and labor unions in the domestic television industry. In March 1981, petitioners brought this action in the Court of International Trade ("CIT") challenging the decision by the Secretary of Commerce, acting pursuant to Section 617 of the Tariff Act of 1930, 19 U.S.C. 1617, to settle certain claims for dumping duties imposed upon television receivers imported from Japan between July 1, 1973, and March 31, 1979.[2] Petitioners' action was filed less than one year

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[1]Although the statute refers to the Secretary of the Treasury, the authority contained in the statute was transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69273 (1979), *reprinted in* 19 U.S.C. (Supp. V) 2171 note; Exec. Order No. 12, 188, 45 Fed. Reg. 989 (1980). Petitioners do not challenge this transfer of authority.

[2]These receivers were subject to a dumping finding known as T.D. 71-76, 36 Fed. Reg. 4597 (1971). The settlement at issue here provides for the payment to the government of a total of $66 million in settlement of claims for dumping duties. In addition, the Secretary of the Treasury approved a settlement totalling $11 million in claims against four importers for potential penalties under 19 U.S.C. (Supp. V) 1592. Although petitioners originally challenged the settlement of the claims for penalties, they apparently have abandoned this challenge.

after the filing of a similar suit in the same court by the Zenith Radio Corporation.[3]

The complaints in the two cases challenged the Secretary's settlement decision on two grounds. They alleged that (1) Section 617 did not authorize the Secretary to compromise claims for dumping duties; and (2) even if the Secretary possessed the authority to enter into the settlement, he exercised that authority in bad faith. Pet. App. 2a. In December 1980, the CIT issued a preliminary injunction prohibiting implementation of the settlement. *Zenith Radio Corp.* v. *United States*, 505 F. Supp. 216.

2. Thereafter, in an appeal that arose out of a discovery dispute in the *Zenith* case, the Court of Customs and Patent Appeals held, *inter alia*, that the Secretary was empowered under Section 617 to enter into the settlement and, because that statute provided "no law to apply," the merits of the Secretary's decision to settle the claims were not subject to judicial review. *Montgomery Ward & Co.* v. *Zenith Radio Corp.*, 673 F.2d 1254, 1259-1260 (1982), cert. denied *sub nom. Zenith Radio Corp.* v. *United States*, No. 82-166 (Oct. 18, 1982) ("*Zenith*"). The court concluded that Zenith could challenge the settlement, if at all, only on the ground that the Secretary failed to comply with the procedures set forth in Section 617. It noted, however, that Zenith's complaint did not allege that the Secretary had failed to comply with those procedures. 673 F.2d at 1262. In addition, the court rejected Zenith's invitation to "look behind the apparent regularity of the procedures into the motives for

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[3]The factual background of the case is summarized in the government's brief in opposition to the petition for a writ of certiorari in *Zenith Radio Corp.* v. *United States*, cert. denied, No. 82-166 (Oct. 18, 1982). We are sending petitioners a copy of our brief in opposition in *Zenith*. (Because Zenith had engaged in substantial discovery prior to the institution of this suit, the cases were not consolidated.)

settlement." *Id.* at 1263. Relying on *United States* v. *Morgan*, 313 U.S. 409, 421-422 (1941), the court held that Zenith could not "inquire into the merits of the settlement or into the Secretary's mental processes in deciding upon settlement in the guise of a challenge to procedure." 673 F.2d at 1264.[4] The case was remanded to the CIT with directions to dismiss Zenith's action for lack of jurisdiction.

3. Following the decision in *Zenith*, petitioners moved for leave to amend their complaint in this case. In Count I of their proposed amended complaint, petitioners repeated the allegations contained in their original complaint to the effect that the Secretary lacked authority to enter into the settlement. Pet. App. 21a.[5] In Count V of their proposed amended complaint, petitioners also repeated their allegation that, if the Secretary possessed the authority to enter into the settlement, he exercised that authority in bad faith. *Id.* at 27a-32a.

The principal difference between petitioner's proposed amended complaint and their original complaint was the inclusion in the proposed amended complaint of three additional counts which alleged that, in entering into the settlement agreements, the Secretary failed to comply with the procedural requirements contained in Section 617. Pet. App. 21a-27a. In Count II, petitioners alleged that the Secretary's decision was not made upon a report by any of the officials enumerated in Section 617. Pet. App. 22a. Count III alleged that the General Counsel's recommendation to the Secretary of Commerce contained "statements

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[4]The court noted that Zenith's allegations of bad faith were "speculative" and "perfunctory." 673 F.2d at 1264 & n.17.

[5]Petitioners admitted that the court in *Zenith* had rejected similar allegations in Zenith's complaint, but they contended that they wished to preserve their position on this count (C.A. App. 151, 157-158). "C.A. App." refers to the appendix in the court of appeals.

and opinions of law and fact that were false, misleading, and not supported by the record upon which the Secretary's decision was required to be based." *Id.* at 23a. In Count IV, petitioners alleged that the Secretary decided to compromise the claims before receiving the General Counsel's recommendation, and that even if the recommendation had been received prior to the Secretary's decision, the Secretary had insufficient time to read and comprehend the recommendation. *Id.* at 26a-27a.

Petitioners also requested the CIT to issue a preliminary injunction prohibiting implementation of the settlement (C.A. App. 615-616). Petitioners correctly anticipated that, in light of the decision in *Zenith*, the CIT would dissolve the preliminary injunction it had issued in that case in December 1980 (see page 3, *supra*). Petitioners contended that, in the absence of a preliminary injunction, the case would become moot.

The CIT granted petitioners' motion for leave to file an amended complaint. Pet. App. 10a n.1. The court denied the request for a preliminary injunction, however, concluding that there was little, if any, likelihood of success on the merits of petitioners' amended complaint. *Id.* at 10a-19a. The court consolidated the hearing on the merits of the amended complaint and entered judgment for the government on all of the counts of the amended complaint. *Id.* at 20a.

The CIT subsequently denied petitioners' motion for an injunction pending appeal. C.A. App. 772-773. On December 2, 1982, however, the Court of Appeals for the Federal Circuit granted petitioners' motion for an injunction pending appeal and ordered that the appeal be expedited.

4. On May 2, 1983, the court of appeals affirmed the judgment of the CIT dismissing petitioners' amended complaint and dissolved the injunction it had issued pending

appeal. Pet. App. 1a-8a. The court observed (*id.* at 4a) that the challenge to the Secretary's authority to compromise the assessment of antidumping duties under Section 617, contained in Count I of the amended complaint, was virtually identical to the challenge that had been rejected in *Zenith*. The court concluded that it remained "unpersuaded that section 617 does not include the power to settle dumping duty claims, or that the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979), altered or limited that power." Pet. App. 4a.

The court of appeals also rejected petitioners' procedural challenges (Pet. App. 5a-7a). With respect to petitioners' contention in Count II that a memorandum prepared by the General Counsel, which addressed each of the criteria required in a Section 617 report, did not qualify as a "report" within the meaning of Section 617 because the General Counsel is not one of the officials designated in the statute for preparing such a report, the court stated that petitioners' construction of the statute would lead to absurd results: it would permit the General Counsel's subordinates to prepare a Section 617 report but would bar the General Counsel himself from preparing it (Pet. App. 6a). As to petitioners' claim in Count III that the General Counsel's recommendation contained false and misleading statements and legal opinions, the court ruled that petitioners' request for review of "the contents of that recommendation for accuracy and validity * * * falls squarely within the proscription of" *Zenith* (Pet. App. 6a). Addressing the allegations in Count IV that the Secretary's decision to settle was made before receipt of the General Counsel's recommendation and that, even if the recommendation had been received beforehand, the Secretary had insufficient time to comprehend the facts, the court noted that the Secretary was familiar with the case and had been monitoring developments closely before he received the recommendation,

and thus the short time span between receipt of the recommendation and execution of the settlement agreements raised no presumption that the Secretary failed to make a reasoned and informed decision (*id.* at 7a). In this connection, the court, citing *United States* v. *Morgan, supra*, observed that it is "beyond the proper role of the courts to inquire of the Secretary what weight he gave to the various factors in reaching his decision," and that, "in any event, the Secretary is not limited solely to the factors explicated in these reports" (Pet. App. 7a).

Finally, the court of appeals rejected petitioners' claim in Count V that the Secretary's exercise of his settlement authority was undertaken in bad faith because, in recommending settlement, the General Counsel allegedly understated the maximum amount of duties the government might collect in the absence of a settlement, and failed to inform the Secretary that the amount of duties ultimately collected might increase if domestic producers were successful in challenging the methodology used by the Department of Commerce in calculating the duties. The court remarked (Pet. App. 8a; emphasis in original):

> With respect to possible differences in the figures supplied by the General Counsel, the court in [*Zenith*] held, 673 F.2d at 1264, "[p]roving that the estimate in the report . . . was lower than what Zenith considers reasonable does not destroy the lawfulness of [*the Secretary's*] decision." * * * The trial court * * * correctly declined [petitioners'] invitation to inquire into the General Counsel's motivation.

5. On May 19, 1983, the court of appeals granted petitioners' motion to reinstate the injunction pending appeal. Thereafter, the court extended the injunction pending appeal until noon, June 20, 1983, and noted that it would not entertain any motions for a further injunction pending

appeal. On June 16, 1983, the Chief Justice denied petitioners' application for an injunction pending consideration of the petition for a writ of certiorari. The full Court denied a similar application on June 27, 1983.

## ARGUMENT

The decision of the court of appeals is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not warrant review. Moreover, review is not warranted here for the additional reason that this case will soon become moot.

1. The trial court correctly noted in the *Zenith* case that in the absence of interlocutory injunctive relief, the Secretary would implement the challenged settlement and that, implementation of the settlement would moot the controversy. *Zenith Radio Corp.* v. *United States*, 16 Cust. Bull. No. 30, at 15 (Ct. Int'l Trade June 29, 1982). Petitioners, in their various requests for interlocutory relief, repeatedly recognized that this principle was directly applicable to this case.

As noted above (see page 7, *supra*), the injunction pending appeal issued by the court of appeals expired at noon on June 20, 1983, and this Court declined to issue an injunction pending disposition of the petition for a writ of certiorari. Accordingly, the Secretary has proceeded to implement the settlement.

The agreements implementing the settlement required the government to use a particular methodology in "liquidating" [6] the relevant entries of television receivers subject to T.D. 71-76, 36 Fed. Reg. 4597 (1971). By statute, once these liquidations occur, they will become final and conclusive. 19 U.S.C. (& Supp. V) 1514(a). The only purpose of

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[6] "Liquidation" is defined in 19 C.F.R. 159.1 (1981) as "the final computation or ascertainment of the duties * * * accruing on an entry" of merchandise into the customs territory of the United States.

this lawsuit was to prevent the entries from being liquidated in the manner specified in the settlement agreements. Many of the entries have now been liquidated in that manner and further liquidations are occurring on a daily basis. Because those liquidations are final and conclusive, it follows that this suit will soon become moot. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43 (1969). Accordingly, the petition should be denied.[7]

2. In any event, petitioners' claims are without merit. Petitioners first contend (Pet. 13-16) that the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, modified the authority granted to the Executive Branch by 19 U.S.C. 1617 to compromise "any claim arising under the customs laws." Petitioners cite absolutely no authoritative support for their position, however. Moreover, this claim is virtually identical to one of the claims presented in the petition for certiorari in *Zenith Radio Corp.* v. *United States*, cert. denied, No. 82-166 (Oct. 18, 1982), and there is no greater reason to grant review here.

The Trade Agreements Act itself does not refer to the compromise authority contained in Section 617, and nothing in its legislative history indicates a congressional intent to affect that authority.[8] As the CIT correctly held in the

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[7]This case is not capable of repetition yet evading review. See *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). There is no assurance that the Secretary will ever again attempt to settle claims for dumping duties assessed upon entries subject to T.D. 71-76, 36 Fed. Reg. 4597 (1971). Moreover, as the lengthy history of this and related litigation demonstrates, if the Secretary at some time in the future attempts to settle claims for dumping duties pursuant to the authority contained in Section 617, it is clear that an aggrieved party with a likelihood of success on the merits could obtain injunctive relief to prevent implementation of the settlement until such time as he has obtained judicial review.

[8]Indeed, the very Congress that enacted the Trade Agreements Act approved the transfer of authority to administer the antidumping law from the Department of Treasury to the Department of Commerce. When Congress approved this transfer of authority, it explicitly recognized the existence of Section 617. See H.R. Rep. No. 96-585, 96th

*Zenith* case, since Section 617 and the Trade Agreements Act of 1979 "reflect different Congressional concerns and apply to different functions of the Secretary" (*Zenith Radio Corp.* v. *United States*, 509 F. Supp. 1282, 1287 (1981)), the two are easily reconciled and both may be given full effect. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). It would "surely do violence to the 'cardinal rule * * * that repeals by implication are not favored' " (*TVA* v. *Hill*, 437 U.S. 153, 189 (1978)), to hold, as petitioners assert, that the Trade Agreements Act of 1979 implicitly repealed the authority contained in Section 617 insofar as it pertains to claims for dumping duties.

Petitioners' argument, at bottom, amounts to nothing more than a wistful assertion that Congress logically could not have intended the Executive Branch to shortcut the procedures created by the Trade Agreements Act by settling dumping claims under Section 617. But that is like arguing that the United States may not settle civil cases or accept plea bargains in criminal cases, because by so doing it would be shortcutting the rules of civil and criminal procedure. The courts below correctly held that Congress intended the administrative and compromise processes to exist side by side, the former to be used when compromises either are not possible or are not considered in the interest of the United States, the latter to be used when they are.[9]

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Cong., 1st Sess. 7 (1979). See also S. Rep. No. 96-402, 96th Cong., 1st Sess. 41 (1979). Congress did not, however, prohibit or restrict the use of the authority contained in that statute to settle claims for dumping duties.

[9]The law, of course, favors the resolution of disputes without litigation. Accordingly, courts have denied standing to those who are not parties to compromise agreements who nevertheless wish to challenge the validity of the agreements. See, *e.g.*, *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1360-1361 (9th Cir. 1979); *Smith* v. *South Side Loan Co.*, 567 F.2d 306, 307 (5th Cir. 1978). The agreements here compromised differences between the government and

3. As already noted, in *Zenith* the Court of Customs and Patent Appeals held that the merits of the settlement were not subject to judicial review and that Zenith and other interested parties (such as petitioners) could challenge the settlement, if at all, only on the ground that the Secretary failed to comply with the procedural requirements of Section 617. 673 F.2d at 1262. In addition, the court held that

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various importers and thus obviated the need to resolve those differences through litigation. Petitioners are strangers to these agreements and do not possess an interest in the duties assessed upon the importers. *Louisiana* v. *McAdoo*, 234 U.S. 627 (1914). Thus, petitioners' standing to attack the settlements at issue in this case is far from certain.

The cases on which petitioners rely (Pet. 16 n.15) are not to the contrary. In *Local 1219, American Federation of Government Employees* v. *Donovan*, 683 F.2d 511 (D.C. Cir. 1982), the rights compromised by the government were those of the union members to a fair election. Here, the government is compromising its own rights. Both *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981), and *United States* v. *Trucking Employers, Inc.*, 561 F.2d 313 (D.C. Cir. 1977), were employment discrimination cases in which the issue was whether the trial courts abused their discretion in affixing a "judicial imprimatur" (*United States* v. *City of Miami, supra*, 664 F.2d at 441) to a consent decree that affected the rights of third parties. In contrast, when the Secretary compromises a claim pursuant to Section 617, he does not seek a judicial imprimatur and, in any event, the rights of third parties are not involved.

In *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), this Court created a narrow exception to the general rule that, in the absence of specific statutory authority, third parties have no right to intervene in an antitrust case instituted by the United States. As explained in *United States* v. *International Telephone & Telegraph Corp.*, 349 F. Supp. 22, 26 (D. Conn. 1972), aff'd *sub nom. Nader* v. *United States*, 410 U.S. 919 (1973), the *Cascade* decision permitted intervention by a purchaser with a strong interest in competition among suppliers for the sole purpose of allowing that purchaser to demonstrate that a proposed settlement did not effectuate a prior mandate of this Court directing divestiture. Finally, the statement in *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961), to which petitioners refer, constitutes dictum. The decision holds that a third party does not possess a right to intervene to contest a settlement between the United States and a third party and clearly does not support petitioners' position.

Zenith could not inquire into the merits of the settlement or into the Secretary's mental processes in the guise of a challenge to procedure and it noted that Zenith's allegations of bad faith were perfunctory. *Id.* at 1263-1264.

Although petitioners' amended complaint purported to allege that the settlement was invalid because Section 617's procedural requirements were not followed, both courts below rejected these claims and petitioners do not renew them in this Court. Instead, petitioners contend that their amended complaint contained "detailed" allegations of "bad faith." Specifically, petitioners claim (Pet. 17-19) that the report and recommendation contained factual and legal errors, that the Secretary did not receive these documents sufficiently in advance of his decision to comprehend their contents and that the settlement recommendation resulted from political pressures exerted by the Government of Japan. Thus, petitioners assert that the government's literal compliance with the procedural requirements of Section 617 was a sham. In effect, petitioners contend that, while they may not obtain judicial review of the merits of the Secretary's decision to enter into the settlement, they may obtain judicial review of the advice provided to the Secretary by his subordinates in order to determine, for example, whether this advice was based upon the facts and was balanced in its approach or whether, instead, the advice was motivated by improper factors. They assert a similar right to obtain judicial review of the precise circumstances surrounding the Secretary's decision.

The courts below correctly rejected this argument. Pet. App. 6a-8a, 17a-19a. To begin with, petitioners' argument assumes that the Secretary is limited, in making his decision, solely to the advice given to him by his subordinates. But, as the court of appeals observed (*id.* at 7a), "the Secretary is not limited solely to the factors explicated in the[] reports." The court in *Zenith* explained that there were

numerous factors that the Secretary could have considered apart from those attacked by petitioners as having been presented inaccurately in the reports (673 F.2d at 1264; footnote omitted):

> Proving that the estimate in the report to [the Secretary] was lower than what [petitioners] consider[] reasonable does not destroy the lawfulness of his decision. Currency fluctuations can play a role in evaluation. Moreover, the dollar amount agreed upon may have been the best figure which could be negotiated regardless of the size of the claim. In any event, it may well be that other considerations were of greater significance than the precise dollar amount of the Government claims. The settlement agreements required more from the importers than the payment of money. Not only were any possible challenges to the assessment of duties expressly waived, but also concessions were obtained requiring cooperation in submitting data and information with respect to future enforcement. A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department not only in this area but in all areas of his responsibility under the Act. We do not know what weight he gave to each of these considerations and, in any event, these are not matters for which the court may demand answers. To require an explanation for this type of discretionary Executive action fundamentally changes the nature and scope of judicial review. Moreover, a court cannot infer fraud or bad faith because the Secretary did not achieve as advantageous a settlement as the court may believe could have been made.

If, as seems clear, the Secretary can base a decision to enter into a settlement on factors beyond those included in the reports from his subordinates, petitioners' challenge to the validity of certain factors in the reports is of little, if any,

relevance. Moreover, as the court of appeals noted (Pet. App. 7a), the question whether the invalidity of any particular factor made a difference in the Secretary's decisionmaking process could be determined only by impermissibly probing the Secretary's mind. See *United States* v. *Morgan, supra*, 313 U.S. at 421-422.

Even if a court could review the circumstances surrounding the Secretary's decision where a substantial showing of bad faith or improper behavior has been made (see *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971)), petitioners have failed to make such a showing here. There is no substance to petitioners' claim that the Secretary did not have sufficient time to make a reasoned decision. As the court of appeals correctly concluded (Pet. App. 7a), "that only a few hours were available between receipt of the report and execution of settlement agreements raises no presumption" that the Secretary did not make a reasoned decision based on all the required information. Accord, *National Nutritional Food Association* v. *FDA*, 491 F.2d 1141, 1144-1146 (2d Cir. 1974). Moreover, as the court pointed out (Pet. App. 7a), "[petitioners] do[] not, and could not, assert that the report was the Secretary's introduction to the case. Without question he had been monitoring developments closely. The record precludes any inference that the Secretary was uninformed."

Finally, petitioners have failed to show that the General Counsel's recommendation in favor of settlement was the result of political pressure imposed by the Government of Japan. An examination of the amended complaint reveals that petitioners' "political pressure" theory is based upon the following syllogism: (a) when the Department of the Treasury was responsible for the administration of the dumping law, officials of that department conducted meetings, which were neither improper nor illegal in themselves, with representatives of the Government of Japan (C.A.

App. 74-79, 94-95); (b) these officials were motivated to take certain actions, which were not in themselves wrongful or illegal, solely as a result of these meetings (C.A. App. 75-79, 81); (c) the recommendation in favor of settlement submitted by the General Counsel of the Department of Commerce to the Secretary allegedly contains certain errors and these errors were deliberately included as the result of "extreme political pressure" (Pet. App. 27a) imposed by the Government of Japan.[10] But even if officials of the Department of the Treasury were motivated to take certain actions solely because of certain meetings and even if the General Counsel's recommendation contained errors that were deliberately included in the recommendation, it simply does not follow that the General Counsel of the Department of Commerce was motivated to include these errors for the same reason that, at a much earlier time, motivated officials of an entirely different government department to take other types of action. In any event, as the court concluded in *Zenith*, the decision at issue here was that of the Secretary of Commerce, and it is not "appropriate to infer bad faith in the Secretary's decision from the alleged transgressions of predecessors." 673 F.2d at 1264.

It is clear, therefore, that petitioners' allegations of bad faith are not sufficient to render the merits of the settlement subject to judicial review in circumstances where it is conceded that judicial review would otherwise be prohibited.[11]

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[10]The amended complaint alleges that the General Counsel was motivated "in a large part" by this pressure (Pet. App. 27a), but does not allege that he was not also motivated by reasons other than this pressure.

[11]This conclusion is clearly correct given the facts in this case. During the period between the decision in *Zenith* and the filing of the amended complaint, petitioners were erroneously permitted to conduct discovery. In the course of this discovery, petitioners examined 250,000 pages of documents and took 15 depositions, including those of officials of the Department of Treasury and the General Counsel of the Department of Commerce. The amended complaint does not refer to these documents

To hold otherwise in the circumstances of this case "would threaten to swallow the rule of nonreviewability." *Baker* v. *International Alliance of Theatrical Stage Employees*, 691 F.2d 1291, 1296 (9th Cir. 1982).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

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or, most importantly, to the depositions. The reason is obvious. Despite this extensive discovery, petitioners were unable to locate any evidence to support their allegations of bad faith.

No. 82-2045

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITIONERS' REPLY BRIEF

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COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION (a.k.a. COMPACT) AND THE IMPORTS COMMITTEE, TUBE DIVISION, ELECTRONIC INDUSTRIES ASSOCIATION,

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit**

## PETITIONERS' REPLY BRIEF

### INTRODUCTION

The government does not challenge petitioners' representations that the issues sought to be reviewed are of major importance, as they govern the implementation of the entire antidumping/countervailing duty programs. Congress has determined that dumping and subsidization of imports distort free market forces, injure American industries and eliminate jobs and employment opportunities for American workers. Just as it has regulated the business conduct of domestic firms through the antitrust laws, Congress has sought, through the antidumping and countervailing duty laws, to regulate the conduct of foreign producers who choose to sell in this market. The

antidumping/countervailing duty regulatory regime is of potential application to all imported merchandise. To date more than 180 administrative findings are in place. Those findings presently cover billions of dollars of trade in products affecting virtually every sector of the economy, including agricultural commodities, basic manufactures, and high technology products. Petition ("Pet.") 3-4. The importance and widespread impact of the issues raised in this litigation are readily apparent.

**1. Petitioners' First Question Presented**

The government's opposition reinforces the critical need to resolve fundamental differences as to how Congress intended the antidumping and countervailing duty statutes to be administered. Petitioners contend that the 1979 amendments to the antidumping law conferred unconditional rights upon interested domestic parties to participate in the administrative assessment of antidumping and countervailing duties and to appeal assessment determinations to the United States Court of International Trade. Those rights were created specifically for the benefit of domestic industries and workers injured by dumped and subsidized imports. Pet. 13-16.

The government responds by asserting that the Secretary of Commerce may circumscribe the rights created in the 1979 reforms by virtue of a general compromise provision (19 U.S.C. § 1617 (1976) ("section 617")) first enacted in 1922 and never previously used in an antidumping proceeding. The government would have us believe that interested domestic parties have no interest in the assessment of antidumping duties, asserting that the "government is compromising its own rights" when it executes settlement agreements. Brief for the United States in Opposition ("Br. in Opp.") n.9. It contends that "[p]etitioners are strangers to these [settlement] agreements,"

which do not involve "the rights of third parties." *Id.* Although all evidence of Congressional intent is to the contrary (Pet. 13-14 & n.14), the government seeks to elevate this once obscure compromise authority to co-equal status with the specific procedures in the antidumping law. Br. in Opp. 10.

The United States Court of Appeals for the Federal Circuit attempts to resolve these diametrically opposed positions by agreeing with the government that the Secretary has unfettered discretion either to assess duties under the 1979 legislation with all of its attendant procedural safeguards, or to compromise the same duties without so much as giving domestic interests notice and the opportunity for comment. No attempt to harmonize these conflicting statutes is made; nor is there any attempt to provide guidelines as to the appropriate circumstances in which one or the other statute should be applied.

This case will permit the Court to resolve these fundamentally different views regarding the essential nature of the antidumping remedy. It is critical to the proper administration of this vital statute that the Court determine whether mandatory provisions of a statute may be selectively negated without recognizable standards, without notice to the holders of substantial rights, and without even the semblance of judicial supervision.

**2. Petitioners' Second Question Presented**

Petitioners allege that the report and recommendation required by section 617 were fraudulently prepared and that procedural compliance with that provision was a sham. These allegations were detailed and specific and, in the procedural posture of this case, must be deemed true and construed in a light favorable to petitioners. Pet. 18 n.16.

Fairly read, the decision below stands for the proposition that such allegations are "not proper for judicial inquiry" regardless of sufficiency. Petitioners' Appendix ("Pet. App.") 5a & 8a. Even the government's opposition does not defend the correctness of this holding (Br. in Opp. 15), but merely seeks to justify the results on other grounds.[1]

Implicit in the Federal Circuit's refusal to find jurisdiction over allegations of bad faith is its determination to accord extreme deference to agency action, particularly where foreign policy implications are perceived. The court below not only would permit the Secretary to deprive domestic interests of the elaborate procedural safeguards of the 1979 law, it would also allow him *carte blanche* authority to ignore even the limited protections afforded by section 617.[2] The Federal Circuit's excessive

[1] In its opposition, the government advances a number of factual considerations not of record upon which it speculates the Secretary could have relied in his compromise determination. Br. in Opp. 12-15. These "*post hoc* rationalizations," of course, provide no basis to justify the Secretary's conduct. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971), *quoting Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962). The facts of record as pleaded in the complaint, and necessarily accepted by the court below as true in the posture of this case, are that the statutorily mandated report was not timely provided to the Secretary; compliance with statutory procedures was a sham; and the entire compromise process was carried out in bad faith in an effort to justify a result that had been preordained for political reasons. It was these facts into which the court below held it had no jurisdiction to inquire.

[2] The Federal Circuit went so far as to assert that "the Secretary [in deciding to compromise] is not limited solely to the factors explicated in these [statutory] reports." Pet. App. 7a. The government has taken the position that since the Secretary is not limited in his settlement decision to consideration of the factors spelled out in the statutory report, "the validity of certain factors in the report is of little, if any, relevance." Br. in Opp. 13-14. The proposition that an

deference has been manifested in other decisions as well. In *Smith-Corona Group, Consumer Products Division, SCM Corp.* v. *United States*, Appeal No. 82-24 (C.A.F.C. Aug. 9, 1983), the new Federal Circuit found that "the *foreign policy repercussions of a dumping determination*, makes the enforcement of the antidumping law a difficult and supremely delicate endeavor" (Slip op. at 4 (emphasis added)) and that the decisions of the Secretary are entitled to "tremendous deference," *id.* at 36.

The Federal Circuit's holding that allegations of bad faith administrative conduct are not justiciable is contrary to the vast weight of authority and accepted principles of American jurisprudence. Pet. 17-20. Its extreme deference to the agency charged with the administration of a regulatory statute because of perceived foreign policy implications poses basic questions as to the proper balance between the needs of the executive and the mandate of Congress.

The antidumping law is not a foreign policy tool of the executive. It does not stem from the President's constitutional authority to conduct foreign policy, but rather from Congress' power to regulate interstate and foreign

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administrator may consider criteria in addition to those established in a relevant statute is, in itself, rather dubious. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 412; *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 508-11 (1981). Even if the Secretary is permitted to consider factors *in addition to* those required by section 617, there is no authority for the proposition that the *bona fides* of the report and recommendation specifically mandated by that statute may be ignored by a reviewing court. The Federal Circuit's excessive deference to the Secretary has enabled him to circumvent not only the extensive procedural safeguards of the 1979 amendments, but the limited procedures of section 617 as well.

commerce. This Court may find that the foreign policy implications of the antidumping law require that some balance be struck in its administration and judicial enforcement. But the blind deference of the Federal Circuit strikes no balance. Rather, it ignores the regulatory nature of the statute and permits selective enforcement of the antidumping law to become a tool of foreign policy. It further relegates the judiciary to the role of a passive witness to agency action without jurisdiction to ensure proper implementation of the Congressional mandate. The extreme measure of declaring that allegations of bad faith in the administration of a key Congressional regulatory program are nonjusticiable warrants review by this Court so that definite guidelines for the reviewing responsibilities of the new Federal Circuit may be established.

**3. This Proceeding Will Not Become Moot**

Contrary to the assertions of the government, this action will not become moot upon liquidation of the customs entries covered by the April 28, 1980 settlement agreements. The agency action under challenge falls clearly within the exception to the mootness doctrine governing conduct which is capable of repetition yet evading review. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

Judicial review of future use of this compromise authority may be avoided by the prompt liquidation of the compromised customs entries. Liquidation normally occurs within six weeks of entry into the customs territory of the United States, S. Rep. No. 249, 96th Cong., 1st Sess. 67, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 453, a duration far shorter than even expedited judicial proceedings. Thus, a future compromise will evade review because liquidations made pursuant to settlement

will moot any controversy prior to litigation.[3] *E.g.*, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-26 (1974).

The government's obvious intention to employ section 617 in the future makes this controversy likely to re-occur and injure petitioners. The government's brief demonstrates that it fully intends to utilize the general compromise authority of section 617 in the future. Br. in Opp. 10. It seeks unfettered discretion to choose between compromise and use of the enforcement proceedings mandated by the antidumping law. It further seeks to insulate its enforcement decisions from participation by interested domestic parties or effective judicial review.

T.D. 71-76, the Japanese television dumping finding, remains in force, *see* 48 Fed. Reg. 37,506 (1983), and the imposition of antidumping duties on current and future imports of Japanese television receivers could be compromised. Moreover, antidumping investigations of color television receivers imported from Taiwan and the Republic of Korea have been initiated at the behest of members of petitioners, 48 Fed. Reg. 23,879 (1983), and antidumping duties potentially due on imports covered by those proceedings could also be compromised. Petitioners therefore have a "reasonable expectation" that section

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[3] The government's suggestion that future compromise will not evade review because of the injunctive power of the courts is, at best, specious. It contends that, "as the lengthy history of this and related litigation demonstrates, . . . it is clear that an aggrieved party with a likelihood of success on the merits could obtain injunctive relief to prevent implementation of the settlement until such time as he has obtained judicial review." Br. in Opp. n.7. If this Court denies certiorari in this proceeding, however, few, if any, aggrieved parties could show a likelihood of success on the merits in future cases so as to obtain the grant of injunctive relief.

617 will again be employed to compromise liability for antidumping duties imposed for their benefit. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125-27 (1974).

Moreover, there is some authority that liquidations made pursuant to the settlement agreements are not final and conclusive as to petitioners. Although a dispositive precedent does not exist, the United States Court of Customs and Patent Appeals ("CCPA") has held liquidations void *ab initio* where premised upon an unlawful legal foundation.[4] *United States* v. *Cajo Trading, Inc.*, 403 F.2d 268 (C.C.P.A.), *cert. denied*, 393 U.S. 827 (1968) (liquidations void when based upon invalid Presidential proclamation); *United States* v. *C.O. Mason, Inc.*, 51 C.C.P.A. 107, C.A.D. 844, *cert. denied*, 379 U.S. 999 (1965) (liquidations void when based upon unconstitutional statute). If petitioners prevail on the merits, the liquidations could be held void under the authority of *Cajo* and *Mason*.[5] The present liquidations accordingly will not moot this controversy.

## CONCLUSION

The decision of the United States Court of Appeals for the Federal Circuit fundamentally alters the statutory

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[4] Petitioners sought injunctions of any implementation of the settlement agreements because of the absence of a dispositive ruling on the void liquidations doctrine.

[5] The government asserts that this action will become moot upon completion of liquidation, citing 19 U.S.C. § 1514(a) (1976 & Supp. V 1981). Br. in Opp. 8. The government's reliance on section 1514 is misplaced. Section 1514 governs only the rights of *importers* to contest liquidations. In *United States* v. *A.N. Deringer, Inc.*, 593 F.2d 1015 (C.C.P.A. 1979), the CCPA found that Congress had effectively eliminated the force of *Cajo* and *Mason* in the realm of an importer's protest under section 1514, but the court expressly re-

scheme enacted by Congress for antidumping and countervailing duty proceedings and raises important questions as to the role of the new Federal Circuit in overseeing the administration of these important statutes. The issues presented in this petition have wide-ranging implications affecting billions of dollars of imports of products involving virtually every sector of the United States economy. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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jected the government's invitation to overrule *Cajo* and *Mason* in other potential applications. *Id.* at 1020. Liquidations remain open to challenge by interested parties (other than importers) who rely on jurisdictional provisions other than section 1514. The government's claim of finality accordingly must fail, for petitioners are not importers and can rely on 28 U.S.C. § 1581(i) (Supp. V 1981) as the jurisdictional basis for their challenge to these void liquidations.